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THE SOUTHERN CASE FOR SCHOOL SEGREGATION

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Introduction

May it please the court:

WHEN THIS book was conceived, it was intended to be titled "U.S. v. the South: A Brief for the Defense," but it seemed a cumbersome title and the finished work is not, of course, a brief for the South in any lawyer's sense of the word. It is no more than an extended personal essay, presented in this form because the relationship that exists between the rest of the country and the South, in the area of race relations, often has the aspect of an adversary proceeding. We of the South see ourselves on the defensive, and we frequently find ourselves, as lawyers do, responding in terms of the law and the evidence.

It is an unpleasant position for the South, which regards itself as very much a part of the American Republic, and it is an uncomfortable position also: We find ourselves defending certain actions and attitudes that to much of the country, and to much of the world, appear indefensible; some times we are unsure just what it is we are defending, or why we are defending it. We would like to think more upon these questions, but in this conflict there seldom seems to be time for thought or for understanding on either side. When one side is crying "bigot!" and the other is yelling "hypocrite!," an invitation to sit down and reason together is not likely to draw the most cordial response.

This brief for the South, as any brief must be, necessarily is a partisan pleading. My thought is to present the South's case (with a few digressions, irrelevancies, reminiscences, obscurities, and mean digs thrown in), but I hope to present it fairly, and without those overtones of shrill partisanship that drown out the voice of reason altogether. And it seems to me, if the suggestion may be advanced with due modesty, that a Virginia Conservative is perhaps in an unusually advantageous position to write such a brief. By tradition, inheritance, geography, and every intangible of the spirit, Virginia is part of the South. The Old Dominion, indeed,

is much closer to the "Old South" than, say, North Carolina or Florida. Richmond was for four years the capital of a *de facto* nation, the Confederate States of America; to this day, our children play soldier in the trenches and romp happily on the breastworks left from the bloody conflict in which the CSA were vanquished. The Confederacy, the War, the legacy of Lee—these play a role in Virginia's life that continues to mystify, to entrance, sometimes to repel the visitor to the State. Virginia's "Southernness" reaches to the bone and marrow of this metaphysical concept; and if Virginia perhaps has exhibited more of the better and gentler aspects of the South, and fewer of the meaner and more violent aspects, we nevertheless have shared the best and the worst with our sister States. On questions of race relations, of school segregation, of a *modus vivendi* tolerable to black and white alike, Virginia's views have been predominantly the South's views.

Yet it is evident, as this is written, that the immediate battle over school segregation has passed Virginia by. The Old Dominion no longer struggles in the arena; we watch from the grandstand now. The desegregation of our public schools has been accepted in principle; a State Pupil Placement Board voluntarily has assigned hundreds of Negro children to schools that formerly were white schools. In our largest cities, most department-store dining facilities, in theory at least, serve any customer who asks to be served. Segregation has ended in transportation facilities, in libraries, in parks, in most places of public assembly. Negroes register and vote freely. It is true of Virginia, I believe, that the more things change, the more they stay the same; down deep, very little has changed. But by and large, Virginia has been eliminated from the fight. I wrote one book about the South a few years ago, when Virginia was still in the thick of it, and I was on horse and the pen was a lance. The sidelines offer a better perspective.

A word of definition is in order. When I speak in this essay of "the South," what I mean is the white South, and more narrowly still, I mean the white adults of thirteen States who continue to share, in general, an attitude on race relations that has descended from attitudes of the "Old

South." There is, of course, a Negro South, but it is mysterious and incomprehensible to most white men. And there is a Liberal South, comprising a large number of white persons who oppose racial segregation in principle if they seldom oppose it in daily practice. These groups have their own able and articulate spokesmen; they have filed their own briefs by the dozen. And it is simply to avoid interminable qualifications—"most white Southerners feel," or "the large preponderance of opinion among white adults in thirteen Southern States holds"—that I here define "the South" for my own immediate purposes.

With those preliminary remarks, let me turn, if I may, by slow degrees, to argument on the case at bar.

JAMES JACKSON KILPATRICK

Richmond
May 1962

Part I

The Evidence

I

AT THE TIME of the Supreme Court's opinion in *Brown* v. *Board of Education*, on Monday, May 17, 1954, seventeen Southern and border States maintained racially separate schools. These included, in addition to the thirteen States to be treated here as "the South," the States of Maryland, Delaware, Kansas, and Missouri, plus the District of Columbia. Each of the five speedily abandoned segregation—Kansas willingly, Missouri stoically, Maryland cheerlessly, Delaware grudgingly. The District abandoned segregation; white parents abandoned the District, and by 1962 an 82 per cent resegregation could be observed in the schools. *Sic transit gloria* Monday. None of the four States was in any real sense a part of the South; their constitutional or statutory requirements for segregated schools were appendages more or less ripe for the clipping. And though southern Missouri and the Delaware shore submitted to desegregation with some bitterness, the surgery was not especially painful and the operations, on the whole, were uneventful.

This essay is concerned chiefly with the other thirteen States, with attitudes and practices that then prevailed widely in all of them and still prevail overwhelmingly in some of them: the States of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. A possibly more definitive list might eliminate Oklahoma and Kentucky from this neo-Confederate fold; their Negro populations comprise no more than 6 or 7 per cent of the State total, and Oklahoma looks to the Southwest while Kentucky (mildly anesthetized by Mr. Bingham's Louisville *Courier-Journal*) looks nowhere in particular. Yet I myself was reared in Oklahoma, and I know at first hand of the intensely Southern sentiment that still obtains in much of the State; my Kentucky friends write me poignantly, as one writes from East Berlin or Poland, asking CARE packages and seeking prayers, and I judge that many Kentuckians continue to look upon integration as they might look upon orange slices in a julep. They

will drink the horrid thing, but their sense of propriety is outraged.

These thirteen States together make up a fascinating part of the American Republic. Their combined area amounts to nearly 863,000 square miles, or about 28 per cent of the continental United States. The 1960 census found in them 48,802,000 persons, of whom 24,036,000 were males and 24,755,000 were females; and, more to our point, the census found in them 38,404,000 white persons, 10,231,000 Negro persons, and 167,000 other nonwhites, mostly Indians in Texas, Oklahoma, and North Carolina.

The census of 1960 turned up a great many other figures useful to an understanding of the American South. Some of these are best presented in tabulated form. These figures, for example, bear close study:

NEGRO POPULATION, THIRTEEN SOUTHERN STATES, 1900–1960

	Per cent Total Pop.			*Per cent*	*Number*
State	*1900*	*1920*	*1940*	*1960*	*1960*
Alabama	45.2	38.4	34.7	30.0	980,271
Arkansas	28.0	27.0	24.7	21.8	388,787
Florida	43.7	34.0	27.1	17.8	880,186
Georgia	46.7	41.7	34.7	28.5	1,122,596
Kentucky	13.3	9.8	7.5	7.1	215,949
Louisiana	47.1	38.9	35.9	31.9	1,039,207
Mississippi	58.5	52.2	49.2	42.0	915,743
North Carolina	33.0	29.8	27.5	24.5	1,116,021
Oklahoma	7.0	7.4	7.2	6.6	153,084
South Carolina	58.4	51.4	42.8	34.8	829,291
Tennessee	23.8	19.3	17.4	16.5	586,876
Texas	20.4	15.9	14.4	12.4	1,187,125
Virginia	35.6	29.9	24.7	20.6	816,258
The U.S.A.	11.6	9.8	9.8	10.5	18,871,831

The Negro component within the American Union, it is evident, remains today about what it has been all along. Within the Southern States, the Negro population is dropping steadily as a percentage of the whole. Negroes comprised

11.6 per cent of the nation's total in population in 1900, 9.7 per cent in 1930, and 10.5 per cent in 1960. But this 10.5 per cent of 1960 has shifted dramatically across the nation. Of 18,872,000 Negroes, 8,641,000 or 46 per cent, were living in 1960 outside the thirteen States of the South. There were more Negroes in New York City (1,227,000) than in all of Mississippi or Alabama. Philadelphia turned up 26.4 per cent Negro; Georgia is 28.5 per cent Negro. Chicago counted almost as many Negroes in its city limits (813,000) as there were in the whole of Virginia (816,000), and they represented a larger part of the total—a concentrated 23 per cent in Chicago, a scattered 21 per cent in Virginia.

Between 1950 and 1960, the Census Bureau has reported, the South experienced a net out-migration of about 1,457,000 Negroes. The figure represents the number of Negroes that census enumerators of 1960 would have expected to find in the South if the Negro populations of 1950 had stayed put and had experienced a normal increase of births over deaths. Alabama, which should have gained 225,000 Negroes on this basis, gained only 1000 in the decade; South Carolina, which normally would have gained 226,000 Negroes, gained only 8000. Mississippi actually experienced a net loss in Negro population, from 986,000 in 1950 to 915,000 in 1960.

Where did these Negro migrants go? To the North, primarily—more than a million of them. Others went west: California experienced a net in-migration of 354,000 Negroes. Large numbers moved to Illinois, Ohio, and Michigan. The migration was almost entirely to Northern cities, and ironically, to urban societies of the North almost as segregated by geography as the Old South is segregated by custom.

Yet for all the steady decline of Negro components in Southern States, it still is true that the South, as a region, houses the largest concentration of colored citizens. Of the fifteen States that in 1960 had more than 500,000 Negro residents, all but four (New York, Illinois, Pennsylvania, and New Jersey) were in the South. The thirteen Southern States that were 35 per cent Negro in 1900 were still 21 per cent Negro in 1960, and in 140 Southern counties, white residents in 1960 remained numerically in the minority.

Consider some further statistics:

URBAN AND RURAL POPULATION
THIRTEEN SOUTHERN STATES, 1900–1960.

State	*Urban 1960*	*Rural 1960*	*Total 1960*	*Per cent Rural* 1900	1920	1940	1960
Alabama	1,791,721	1,475,019	3,266,740	89.0	78.3	65.2	45.2
Arkansas	765,303	1,020,969	1,786,212	91.5	83.4	77.2	57.1
Florida	3,661,383	1,290,177	4,951,560	79.7	63.5	44.9	26.0
Georgia	2,180,236	1,762,880	3,943,116	84.4	74.9	65.6	44.7
Kentucky	1,353,215	1,684,941	3,038,156	78.2	73.8	70.2	55.4
Louisiana	2,060,606	1,196,416	3,257,022	74.5	65.1	58.5	36.7
Mississippi	820,805	1,357,336	2,178,141	92.3	86.6	80.2	62.3
North Carolina	1,801,921	2,754,234	4,556,155	91.1	80.8	72.7	60.4
Oklahoma	1,464,786	863,498	2,328,284	92.6	73.5	62.4	37.0
South Carolina	981,386	1,401,208	2,382,594	87.2	82.5	75.5	58.8
Tennessee	1,864,828	1,702,261	3,567,089	86.5	73.9	64.8	47.7
Texas	7,187,470	2,392,207	9,579,677	82.9	67.6	54.6	24.9
Virginia	2,204,913	1,762,036	3,966,949	81.7	70.8	64.7	44.4

These figures, as I hope to demonstrate after a while, should be treated with some reserve, but on their own they tell a revolutionary tale. Of the twelve States that were firmly rural in 1940, only North and South Carolina, Kentucky, Arkansas, and Mississippi were found predominantly rural in 1960. This migration from the countryside has seen the number of farms in the South drop from 3,100,000 in 1910 to 1,650,000 in 1959; the number of farms either owned or operated by Negroes has dropped from 890,000 to 272,000 in the same period.

In many aspects, to be sure, the census of 1960 found the South hardly changed at all. The region still is composed overwhelmingly of native-born Americans; except for Florida and Texas, none of the thirteen States has as much as four-tenths of 1 per cent foreign-born population. Southerners still are moving out of the South more rapidly than non-Southerners are moving in, but the Southern tendency to stay put remains much in evidence: 90 per cent of the citizens of Mississippi were born there, and the percentage is almost as high in Alabama and the Carolinas.

In terms of material wealth, our people remain relatively poor. Per capita incomes in 1959 ranged from $1162 in Mississippi to $1980 in Florida, against a national average of $2166. Wages in the thirteen States then averaged $73.31 weekly and $1.82 hourly, far below national averages of $90.91 and $2.29. As one consequence, housing conditions are sadly below par. The 1960 census found, in the country as a whole, 18.8 per cent of all dwellings "dilapidated or lacking plumbing facilities"; the percentages were 49.2 in Mississippi, 44.9 in Arkansas, and 41.2 in Kentucky; and no State outside the South approached these poor ratings.

The picture is not entirely bleak. Poor as they are, the Southern States in general are exerting a much greater effort than their wealthier Northern sisters. Over the country as a whole, State and local governments in 1959 raised $102.12 per capita from their own tax sources. Seven of the thirteen Southern States were far above this average: Mississippi, for example, raised $128.76 per capita from local sources, a figure that compares with $108.92 in New York, $83.56 in Connecticut, and $81.51 in Delaware. With much less to

levy upon, the Southern States proportionately are pouring more into their schools. And the outlook is brightening steadily. Between 1929 and 1959, while the nation as a whole was increasing its per capita personal incomes by 208 per cent, South Carolina was jumping 393 per cent and Louisiana 280 per cent.

Permit a few more statistics. The South's traditional distaste for government remains quite evident. Florida, Louisiana, and Oklahoma have slightly more than the average number of State and local government workers in terms of population, but the others are far below the national average. The South has small appetite for the welfare state; our relief rolls are large, owing chiefly to social difficulties among the Negroes, but grants are kept relentlessly low. Our people are churchgoers, in fantastic numbers. We continue to produce more moonshine whiskey than any other region. In 1961, there were 486 daily newspapers in the South, with a circulation of 12,500,000. Almost 40 per cent of the country's radio stations are in the South; North Carolina has more AM stations than the State of New York, and Texas has more radio stations than anybody.

II

The foregoing figures tell little enough, to be sure, about the South; you learn nothing much about a sonnet by a footnote on its rhyme scheme. For it is a truism that there is not one South; there are, it is said, many Souths.

Eighteen hundred miles separate the Rio Grande at El Paso from the James at Hampton Roads. The intervening land is immensely varied. The South begins, at its western rim, in canyon country, red-walled, black-hilled; the bare and bony mountains stretch across the prairie like the skeletons of dinosaurs. This is hard country, burned by the sun and wrinkled by the unceasing wind; this is Texas, and almost everything men say of it is true. Oklahoma, to the north, is a pocket paper-back edition of its brawny southern neighbor. Both States offer moments of surpassing beauty and long stretches of surpassing dullness; they offer a splendid, lonesome emptiness of time and space, and then, abruptly, the

sophistication of Dallas and the busy commerce of Oklahoma City and Houston.

Coming east, one finds Arkansas, and below it Louisiana; Ozark country, the endless foothills that never quite reach to the foot of anything, to the south the flatlands and bayous, the white cranes flying, the River, incredibly massive, the jeweled city one caresses as a mistress in his dreams.

Across the River, Mississippi and Alabama: cotton country, bottom land, mules and iron; small towns that evoke in bank and clock and feed store, in the inevitable bronze soldier standing guard in courthouse square, the image of small towns everywhere; progress and poverty, the hot breath of Birmingham, the Monopoly suburbs, their roofs all in line and neat bibs of crab grass under their chins.

On to the east, Georgia: red clay and cotton, the prosperous incongruity of Atlanta, resting on the homely landscape like a diamond stickpin on a shabby tie. To the south, the separate nation that is Florida, post-card blue, lemon yellow, an old man nodding on a St. Petersburg bench, a swamp child gazing from a quiet pier; Miami, and the Beach, the liquid ripple of Cuban tongues; the bonefish, silver as sixteenth notes in amethyst water. Back again to the north: Tennessee, timbered, taciturn, green-hilled, the great lakes of the TVA; Memphis and Knoxville and Nashville; the accent that thins a short *e* to a short *i*. Above Tennessee, Kentucky, tied inescapably now to the North and Midwest, hard politics, soft speech, burley tobacco, and good bourbon.

To the east again, Virginia and South Carolina, with North Carolina between them, "a valley of humility between two mountains of conceit," or more accurately, a peak of giddy-up between two valleys of whoa. South Carolina is moss and small creeks, camellias, azaleas, the rugs a little thin, the white tapers gleaming, ancestors on the walls and Calhoun's brooding spirit still alive, Camden and Columbia, and a classic capitol still pocked by Yankee shells. To the north, tobacco country; Charlotte, thrusting ahead, brief-cased, snap-brimmed; universities, schools, textiles, furniture mills, the black cypress quietude of the inland waterway.

Finally, Virginia, stretching four hundred miles from her coal country to her beaches; tobacco and peanuts; the gem

that is Williamsburg, the plantation country, the somnolent Northern Neck, Mr. Jefferson's University, the hunt country, the changelessly changing capital city where I write.

This land of ours is many-rivered, and the rivers have lovely names: the Apalachicola, Chattahoochee, Pee Dee, Yadkin, Tombigbee, Brazoo, Mobile, the York, the James, the Mattaponi. Our mountains are mostly old, worn down, the edges rubbed off: the Blue Ridge, the Alleghenies, the Great Smokies, the Ozarks. Our summers are hot and humid; the winters are uninteresting outside of Florida; but spring in the South is a cool *rosé*, and October in Virginia is a sparkling champagne. I speak to the court in this brief, as Your Honors will have noted, with an affection that ought perhaps to be brought back in bounds; along with the most beautiful horses in the world, we have some of the meanest mosquitoes south of New Jersey, an oversupply of shif'less dogs, and vast quantities of stinging nettles; we have sandflies, horned toads, and chiggers; we have our fair share of men who give short weight, of bigoted men, unkind, intolerant; we are given in a Cavalier South to drinking too much, and in the Bible Belt, to drinking not enough; we have men who honk at traffic lights, and women who giggle, and politicians who are full of wind; the Southern Shintoism that is sometimes a blessing is as often a curse; some of our cities are dirty, and most of our streets have lumps in them. But this is the many-faceted, cloudy, crystalline compound called the South.

Yet, no, *it is not the South*. The truism of "many Souths" will not stand too much weight. Every region in the country has its contrasts, its extremes, its anomalies, its measurable differences. An essential point can be missed in overconcentration on the Rural South, the Urban South, the New South, the Old South, the Liberal South, the Conservative South. There remains a great and well-understood meaning simply in *the* South; there is, in fact, a sense of oneness here, an identity, a sharing, and this quality makes the South unique in ways that New England, and the Midwest, and the West do not approach. The Confederacy was, as a matter of law, a state in being; but it was first of all, and still is, what so many observers have termed it: a state of mind. And running

through this state of mind, now loose as basting thread, now knotted as twine, now strong and stubborn as wire, coloring the whole fabric of our lives, is this inescapable awareness: the consciousness of the Negro.

III

How, in 1962, does one begin to discuss this awareness? *Mea culpa, mea culpa, mea maxima culpa?* No, perhaps, the best observation to make at the outset is that the South, in general, feels no sharp sense of sin at its "treatment of the Negro." The guilt hypothesis is vastly overdrawn. If wrong has been done (and doubtless wrong has been done), we reflect that within the human relationship wrong always has been done, by one people upon another, since tribal cavemen quarreled with club and stone. And whatever the wrongs may have been, the white South emphatically refuses to accept all the wrongs as her own. For the South itself has been wronged—cruelly and maliciously wronged, by men in high places whose hypocrisy is exceeded only by their ignorance, men whose trade is to damn the bigotry of the segregated South by day and to sleep in lily-white Westchester County by night. We are keenly aware, as Perry Morgan remarked in a telling phrase, of a North that wishes to denounce discrimination and have it too.

But let us begin gently. The Southerner who would grope seriously for understanding of his own perplexing region, and the non-Southerner who would seek in earnest to learn more than his textbooks would tell him, cannot make a start with *Brown* v. *Board of Education* on a May afternoon in 1954. Neither can he begin with *Plessy* v. *Ferguson* in 1896, or with ratification of the Fourteenth Amendment in 1868, or with Appomattox three years earlier. A start has to be made much earlier, in 1619, when the first twenty Negroes arrived from Africa aboard a Dutch slaver and fastened upon the South a wretched incubus that the belated penances of New Englanders have not expiated at all.

We of the South have been reared from that day in a strange society that only now—and how uncomfortably!—

is becoming known at first hand outside the South. This is the dual society, made up of white and Negro coexisting in an oddly intimate remoteness. It is a way of life that has to be experienced. Children mask their eyes and play at being blind. Even so, some of my Northern friends mask their eyes and play at being Southern; they try to imagine what it must be like to be white in the South, to be Negro in the South. Novelist John Griffin dyed his skin and spent three weeks or so pretending to be Negro, looking for incidents to confirm his prejudices. But a child always knows that he can take his hands from his eyes, and see, that he is not really blind; and those who have not grown up from childhood, and fashioned their whole world from a delicately bounded half a world, cannot comprehend what this is all about. They wash the dye from their imaginations, and put aside *The New York Times,* and awake to a well-ordered society in which the Negroes of their personal acquaintance are sipping martinis and talking of Middle Eastern diplomacy. They form an image of "the Negro" (as men form an image of the French, or the British, or the Japanese) in terms of the slim and elegant Harvard student, the eloquent spokesman of a civil rights group, the trim stenographer in a publishing office: Thurgood Marshall on the bench, Ralph Bunche in the lecture hall. It is a splendid image, finely engraved on brittle glass, an object of universal admiration on the mantle of the *New Republic.* It is an image scarcely known in the South.

My father came from New Orleans. His father, a captain in the Confederate Army, returned from the War and established a prosperous business in ship chandlery there. And though I myself was born in Oklahoma, Father having moved there just prior to World War I, we children visited along the Delta in our nonage. We sailed on Pontchartrain, and crabbed at Pass Christian, and once or twice were taken from school in February to sit spellbound on Canal Street and watch the Mardi Gras go by. Our life in Oklahoma was New Orleans once removed; it was a life our playmates accepted as matter-of-factly as children of a coast accept the tides: The Negroes *were;* we *were.* They had their lives; we had ours. There were certain things one did: A proper

white child obeyed the family Negroes, ate with them, bothered them, teased them, loved them, lived with them, learned from them. And there were certain things one did not do: One did not intrude upon their lives, or ask about Negro institutions, or bring a Negro child in the front door. And at five, or six, or seven, one accepted, without question, that Calline and Cubboo, who were vaguely the charges of a Negro gardener up the street, had their schools; and we had ours.

Does all this have the air of a chapter from William Gilmore Simms or a post-bellum romance by Thomas Nelson Page? I myself lived it, forty years ago; my own sons have lived it in this generation. My father lived it, and his father before him. For three hundred years, the South has lived with this subconsciousness of race. Who hears a clock tick, or the surf murmur, or the trains pass? Not those who live by the clock or the sea or the track. In the South, the acceptance of racial separation begins in the cradle. What rational man imagines this concept can be shattered overnight?

We had two Negroes who served my family more than twenty years. One was Lizzie. The other was Nash. Lizzie was short and plump and placid, and chocolate-brown; she "lived on," in a room and bath over the garage, and her broad face never altered in its kindness. Nash was short and slim, older, better educated, more a leader; she was African-black; and as a laundress, she came in after church on Sundays, put the clothes down to soak in the basement tubs, gossiped with Lizzie, scolded her, raised Lizzie's sights. On Monday, the two of them did the wash, hanging the clothes on heavy wire lines outside the kitchen door, and late in the afternoon Nash ironed. She pushed the iron with an economical push-push, thump; turn the shirt; push-push, thump. And I would come home from school to the smell of starch and the faint scorch of the iron and the push-push, thump, and would descend to the basement only to be ordered upstairs to wash my hands and change out of school clothes.

Toward the end of their lives, disaster came to both of them. Lizzie went slowly blind, through some affliction no

surgeon could correct, and Nash lost the middle three fingers of one hand when her scarf tangled in the bellows of a church organ. Nevertheless, they stayed with us until age at last put them on the sidelines. And as far as love and devotion and respect can reach, they were members of the family. Yet I often have wondered, in later years, did we children know them? Did Mother and Father know them? I do not think we did.

This relationship, loving but unknowing, has characterized the lives of thousands of Southern children on farms and in the cities too. White infants learn to feel invisible fences as they crawl, to sense unwritten boundaries as they walk. And I know this much, that Negro children are brought up to sense these boundaries too. What is so often misunderstood, outside the South, is this delicate intimacy of human beings whose lives are so intricately bound together. I have met Northerners who believe, in all apparent seriousness, that segregation in the South means literally that: *segregation*, the races stiffly apart, never touching. A wayfaring stranger from the New York *Herald Tribune* implied as much in a piece he wrote from Virginia after the school decision. His notion was that whites and Negroes did not even say "good morning" to each other. God in heaven!

In plain fact, the relationship between white and Negro in the segregated South, in the country and in the city, has been far closer, more honest, less constrained, than such relations generally have been in the integrated North. In Charleston and New Orleans, among many other cities, residential segregation does not exist, for example, as it exists in Detroit or Chicago. In the country, whites and Negroes are farm neighbors. They share the same calamities —the mud, the hail, the weevils—and they minister, in their own unfelt, unspoken way, to one another. Is the relationship that of master and servant, superior and inferior? Down deep, doubtless it is, but I often wonder if this is more of a wrong to the Negro than the affected, hearty "equality" encountered in the North. In the years I lived on a farm, I fished often with a Negro tenant, hour after hour, he paddling, I paddling, sharing the catch, and we tied up the boat and casually went our separate ways. Before *Brown* v. *Board*

of Education, it never occurred to me that in these peaceful hours I was inflicting upon him wounds of the psyche not likely ever to be undone. I do not believe it occurred to Robert either. This is not the way one goes fly-casting on a millpond, with Gunnar Myrdal invisibly present on the middle thwart. We fish no more. He has been busy in recent years, and I too; and when I came across the flyrod recently, I found the line rotted and the ferrules broken.

I say this relationship "has been," and in the past perfect lies a melancholy change that disturbs many Southerners deeply. In my observation, a tendency grows in much of the white South to acknowledge and to abandon, with no more than a ritual protest, many of the patent absurdities of "Jim Crow." Many of these practices, so deeply resented in recent years by the Negro, may have had some rational basis when they were instituted in the post-Reconstruction period. When the first trolleys came along, the few Negroes who rode them were mostly servants; others carried with them the fragrance of farm or livery stable. A Jim Crow section perhaps made sense in those days. But in my own nonage, during the 1920s, and in the years since then, few Southerners ever paused to examine the reasons for segregation on streetcars. We simply moved the little portable sign that separated white from Negro as a car filled up, and whites sat in front of the sign and Negroes sat behind it. This was the way we rode streetcars. After *Brown* v. *Board of Education,* when the abiding subconsciousness of the Negro turned overnight into an acute and immediate awareness of the Negro, some of these laws and customs ceased to be subject to reason anyhow; they became, confusingly, matters of strategy; they became occupied ground in an undeclared war, not to be yielded lest their yielding be regarded as needless surrender. Many aspects of our lives have gone that way since. The unwritten rules of generations are now being, in truth, unwritten; in their place, it is proposed by the apostles of instant integration that there be no rules at all. It seems so easy: "What difference does the color of a man's skin make?" "Why not just treat them as equals?" "There is no such thing as race."

Ah, but it is not so easy. The ingrained attitudes of a life-

time cannot be jerked out like a pair of infected molars, and new porcelain dentures put in their place. For this is what our Northern friends will not comprehend: The South, agreeable as it may be to confessing some of its sins and to bewailing its more manifest wickednesses, simply does not concede that at bottom its basic attitude is "infected" or wrong. On the contrary, the Southerner rebelliously clings to what seems to him the hard core of truth in this whole controversy: *Here and now*, in his own communities, in the mid-1960s, the Negro race, as a race, plainly is not equal to the white race, as a race; nor, for that matter, in the wider world beyond, by the accepted judgment of ten thousand years, has the Negro race, as a race, *ever* been the cultural or intellectual equal of the white race, as a race.

This we take to be a plain statement of fact, and if we are not amazed that our Northern antagonists do not accept it as such, we are resentful that they will not even look at the proposition, or hear of it, or inquire into it. Those of us who have ventured to discuss the issues outside the South have discovered, whenever the point arises, that no one is so intolerant of truth as academicians whose profession it is to pursue it. The whole question of race has become a closed question: the earth is a cube, and there's an end to it; Two and two are four, the sun rises in the east, and no race is inferior to any other race. Even the possibility of a conflicting hypothesis is beyond the realm of sober examination. John Hope Franklin, chairman of the history department at Brooklyn College, sees Southern attitudes on race as a "hoax." Their wrongness is "indisputable." To Ashley Montagu, race is a myth. A UNESCO pamphlet makes the flat, unqualified statement that "modern biological and psychological studies of the differences between races do not support the idea that one is superior to another as far as innate potentialities are concerned." And when one inquires, why, pray, has it taken so long for the Negro's innately equal potentialities to emerge, the answers trail off into lamentations on the conditions under which the Negro has lived. Thus, the doctrine of environment, like the principle of charity, is trotted out to conceal a multitude of sins. The fault, if there be any fault, is held to be not in men's genes, but in their substandard housing.

All this is to anticipate some of the points this brief is intended to develop, but it is perhaps as well to know where the argument is going. The South does not wish to be cruel, or unkind, or intolerant, or bigoted; but in this area it does not wish to be unrealistic either. We do not agree that our "prejudice" in this regard is prejudice at all, in the pejorative sense in which the word is widely used. The man who wakes up ten times with a hangover, having had too much brandy the night before, is not "prejudiced" against brandy if on the eleventh occasion he passes the brandy by; he has merely learned to respect its qualities. And what others see as the dark night of our bigotry is regarded, in our own observation, as the revealing light of experience. It guides our feet. As Patrick Henry said, we know no other light to go by.

IV

The consciousness of the Negro, I have said, is one common thread in the fabric of the South. There are others, identified by countless observers who have looked upon this tapestry, that merit some discussion also. Let me expand for a few moments on three themes: The Southerner as Conservative, the Southerner as Romantic, the Southerner as Realist.

Russell Kirk, in *The Conservative Mind,* examined the philosophy that generally is identified as "Southern conservatism" and found it rooted in four impulses. Apart from the Southerner's sensitivity to the Negro question, he said, there is (1) his half-indolent distaste for alteration, (2) his determination to preserve an agricultural society, and (3) his love for local rights. These are good starting points. It was John Randolph who laid it down, as a first principle of political activity, never needlessly to disturb a thing at rest. The pace of life *is* slower in the South, and the tendency cannot be accounted for simply in terms of a climate that often makes it "too hot to move." We are by nature a contemplative people, and I am inclined to believe this stems from the agrarian tradition. A farm boy learns early that some things can't be hurried—the birth of calves, the tasseling of corn, the curing of tobacco. On the farm, life is governed by pa-

tience, by the inexorable equinoctial rotation of the seasons, by factors beyond man's control. It is, we say, "God's will."

And until quite recently, as the census records show, the agricultural society was our prevailing society. Moreover, the 1960 census figures on urbanization, within the context of the South, can be highly misleading. A great part of this statistically "urban" population lives in towns so small that the towns are spiritually and economically a part of the rural countryside around them. There were in 1960 only seventy metropolitan areas of more than 50,000 population in the thirteen States, and twenty of these were in Texas. In Mississippi, Jackson has edged past 100,000, but no other city in the State is even close to that mark. Outside of Fort Smith and Little Rock, Arkansas is a State of small towns. This is even truer of North Carolina; fewer than one-fourth of the State's four and a half million residents live in the six principal cities (the largest is Charlotte, with a metropolitan population of 272,000). The others are scattered through scores of towns and villages. Georgia is statistically "urban" now, but urban attitudes are largely concentrated in Atlanta, and perhaps four other cities. Beyond Charleston, Columbia, and perhaps Greenville, South Carolina is almost as countrified today as it was in the time of Calhoun.

The slowness of life in the country, where diversions are few and the reasons for haste almost nil, tends to breed men who are highly resistant to change. They know, as well as they know anything, that change and progress are not necessarily to be equated; and for all the tub-thumping that goes on in local chambers of commerce, many a Southerner is not so sure he is in favor of progress anyhow. The Northern Neck of Virginia, for one example, has a positive antipathy to altering anything.

The conservatism that is identified with the South, as W. J. Cash remarked in his great work, *The Mind of the South*, runs continuously with the past. It embraces also a strong sense of community, of *place*, of local institutions and families and classes. Primogeniture vanished with the American Revolution, but its vestigial spirit may be observed at every hand; whole generations of Randolphs have been lawyers, and whole generations of Tuckers have been doctors and

ministers. The South is a land not only of "Juniors," but of "IIIs" and even "IVs."

Because of this intense spirit of local as well as State identification, an almost universal dedication to "strong local government" is apparent. There is more to this than local sentiment. If there is one aspect of Southern conservatism more pronounced than the others, it is the instinctive suspicion of all government that forever stirs uneasily in the Southern mind. Cash has described as "the ruling element" of Southern tradition, this "intense distrust of, and, indeed, downright aversion to, any actual exercise of authority beyond the barest minimum essential to the existence of the social organism." We do not *like* authority, especially needless, lint-picking, petty authority, and a broody pessimism constantly evokes the apprehension that government, if given half a chance, will put a fast one over on the people. In the eternal conflict of man and the state, the South stands in spirit, at least, firmly on man's side. From the very beginning of the American Republic, our ruling doctrines have been based upon strict limitation of the powers of government. The people of Virginia came warily into the Union, in 1788, on the explicit understanding that the political powers they were lending the central government "may be resumed by them whensoever the same shall be perverted to their injury or oppression," and the Virginians wanted it known that "every power not granted [to the central government] under the Constitution remains with them and at their will." Ten years later, when this promise of pessimism was abundantly fulfilled in the Sedition Act, Kentucky and Virginia were beside themselves. What could be done to restrain officials who usurped power? "Bind them down," thundered Jefferson, "with the chains of the Constitution!"

Still another aspect of Southern conservatism, deeply rooted in the agrarian tradition, is the respect for property that dwells inherently in the Southern mind to this day. George Mason, composing the Virginia Declaration of Rights, did not hesitate to use the word itself; man's inalienable rights, he declared, embraced not only the enjoyment of life and liberty, but also the means of acquiring and possessing *property*. Part of this feeling may stem from the Englishman's

tradition of his home as his castle, and part from the farmer's conviction that, though the bottom fall out of the market on corn or pigs or cotton or tobacco, in the end his land will sustain him.

Whatever the root sources, the tendency has carried over even to the expanding cities of the urbanized South. It has not been a fear of integrated housing (this specter is a late arrival on the scene) that has made the South relatively so slow to embrace Federal grants for slum clearance, public housing, and urban renewal. Much of the public resistance, sometimes made manifest and sometimes merely sensed, is a consequence of this inbred feeling for property; it is a feeling that responsibility for housing rests with the individual first of all, and that no man's property should be taken under eminent domain except for literal public use. When Southern cities experienced their first wave of dime-store "sit-ins," early in 1960, the startled reaction sped at once to the rights of the store owner: This lunch counter was his *property*. Did he not have a right to control its use?

Finally, I would suggest that the Southerner as Conservative is affected, perhaps more strongly than he himself would acknowledge, by a respect for divine power. Again, the agrarian inheritance plays a part in this legacy. The miracle of the seed, the continuum of the forest, the closeness of animal birth and life—these work a profound influence on men whose existence is tied umbilically to nature. In the loneliness of field or prairie, the smallness of man and the largeness of God strike to the heart's core. The blessing of the harvest, the wrath of the storm, and the benediction of a slow and mizzling rain on freshly seeded land speak to the Southerner of God's handiwork.

Perhaps by reason of these influences, organized religion, predominantly among low-church Protestant denominations, continues to play a pervasive role in Southern life. To be sure, the parent Protestantism gives off some notable sports—the Faith Healers, snake-handlers, and the Holy Rollers—and the abiding fundamentalism of the region continues to manifest itself in pockets of strict Prohibition and in contemporary versions of the Tennessee Monkey Trial. But religion crops up in other ways, in the grace before meals expected at every

public function, in the phenomenal sales of religious books, and in the incredible proliferation of choirs, sodalities, ladies' auxiliaries, young peoples' groups, vestries, boards of deacons, church suppers, and building-committee meetings that characterize life from Brownsville to Virginia's Eastern Shore. A Southerner who does not belong to *some* church is not regarded as suspect, exactly, but he is just a little odd. And if the low-tax Southerner traditionally is penurious in rendering unto his Caesars the things that are Caesar's, he is often sacrificial in rendering unto God the things that are God's.

The deference that is paid to Holy Writ and to evidences of divine intervention doubtless contributes to the character of the Southerner as Romantic. Faith and superstition and myth are cousins, hardly even once removed, and whatever else it may be, the South is first of all a land of legends. This is a terrible annoyance to historians; they look upon our pretty myths, and know they are not so, and expose their fallacies in a thousand footnotes, but like the South, the legends rise again. "Few groups in the New World have had their myths subjected to such destructive analysis as those of the South have undergone in recent years," C. Vann Woodward once observed.

Yet the myths persist. There is the Old South legend of the white-columned plantation, the hoop-skirted belles, the hot-blooded men. In the foreground, beneath the magnolia trees, the darkies are plucking banjos; in the background, rows upon rows of cotton, and off to one side, a steamboat coming around the bend. Master loves the Negroes, and the Negroes love old Master. The words and music are by Stephen Foster. This, we like to say, was how things *were* in the ante-bellum South. The exasperated scholar, emerging from his Will Books, cries out his anguish in the quarterly reviews: The records *prove* it was not so; they prove that slave ownership was limited; the records prove that Southern Negroes—as many as 100,000 or 200,000 of them—deserted to the Union cause in the War; the records probably prove there weren't but thirty-two banjos in all of Carolina.

These labors of genealogy go utterly unrewarded. With what Cash has described as the South's "naive capacity for

unreality," our people pat the historians on their fevered brows, thank them kindly just the same, and return untroubled to an intuitive devotion to the things that never were.

"I am an aristocrat," cried Randolph of Roanoke. And the Southerner regards him with an affection not extended to Clay or Calhoun or Jefferson. So, we imagine, were they all—*all* aristocrats, men of ease, and grace, and elegance, and high birth; men who lived by a code of honor, and died beneath the dueling oaks; men who gambled with skill, and loved with passion; men who fought with a royal disdain for risk. Well, Cash and Woodward and a dozen others have had a hand in exploding this Cavalier myth. Tediously, with infinite pains, they have dredged up the pedestrian facts. The Southerner will have none of them; he knows better than to let a few facts interfere with a good story. His colonists all wear ruffled collars; his ladies, blue-veined, are pale and pure as talisman roses. *"I am an aristocrat: I love freedom; I hate equality!"* Who in the South could disclaim the Randolph inheritance?

It is not only the myths of the pre-Revolutionary South and the ante-bellum South that have been so sharply assailed. The Southwest's legends of the cowboy have been worked over too. The frontiersmen of Tennessee and Kentucky, on examination, prove to be something less than godlike men. The Creole stories of New Orleans, the richly embroidered legends of the War of '61–'65, the tales of Reconstruction hardships, even the twentieth-century chronicle of Jim Crow, have been cracked by the academic refineries—but no catalyst ever seems wholly effective. As soft as Spanish moss, and almost as insubstantial, legends subtly dominate the Southern mind.

And it is not a bad thing. Legend is born of truth, however remote and obscure the fatherhood may be, and legend has a way of siring truths stamped in ancestral molds. The hospitality of the plantation, as a universal pastime, may not bear too strong a light; but "Southern hospitality," its descendant, is a working truth today. Not all the colonists were Cavaliers, and not all the Cavaliers, we may reasonably assume, were mannered men; but a Southern manner, born

of the Cavalier myth, persists in our own time. It is the Virginian's "Sir," the Texan's "Ma'am." To the Southerner, in Burke's phrase, manners are always more important than law. Deference to women, principles of personal honor, the payment of a gentleman's debts—these are operative aspects of the "Southern Way of Life." Objections of "unreality" are put to one side.

But, may it please the court, there is the Southerner as Realist too. It is the weight that balances. Cash wrote of the tendency in New England, in the Reconstruction period, for men to turn increasingly to science and technology, and increasingly away from the customary forms of religion. "But in the South," he said, "the movement was to the opposite quarter. For invariably when men anywhere have come upon times of great stress, when they have labored under the sense of suffering unbearable and unjust ill and there was doubt of deliverance through their own unaided effort, they have clung more closely to God and ardently reaffirmed their belief. Invariably they have tended to repudiate innovation, to cast off accretion, to return upon the more primitive faith of the past as representing a purer dispensation and a safer fortress. And if I have represented our Southerners as determined to have the mastery, yet it must be said that terror was continually threatening to seize the ascendancy, that there was in their thought a huge vein of gloomy foreboding, which trembled constantly on the verge of despair."

The student of our affairs who does not understand this much about the South does not understand the South at all. I do not know who it was who made the observation first—Donald Davidson, or Richard Weaver, or Louis Rubin, or Arthur Schlesinger, or Vann Woodward, or some forgotten historian of eighty years ago; it does not really matter; untutored, I wrote it myself in high school—that alone among all the regions of the Union, the South has known defeat. To know defeat is to know sin; it is the ultimate blasphemy against the American theology. As a nation, we are geared to instant success: Listerine will vanish bad breath, and Bufferin will cure a headache; a touch of Wildroot will clear up one's dandruff; any boy may aspire to be President, or to make a

million dollars, or to play center field for the Yankees. Failure —permanent, total, unqualified failure—is unknown. It is intolerable. It shatters the grand American illusion.

But the South has known failure. It has known what it is to do one's best, to fight to exhaustion, and to lose. This huge vein of gloomy foreboding, this constant trembling on the verge of despair, was not an isolated phenomenon of the Reconstruction period. In Cash's phrase, it is part of the collective experience of the Southern people. We have known defeat.

And not in war only. Long before the War, as the industrial North leaped to surpass the agrarian South, the thin, serrated edge of poverty began to cut across the South. The Tariff of Abominations was a beginning of it, and Calhoun and the South cried out in anger against its unfairness. The terrible institution of slavery contributed to it, but slavery was a tiger by the tail, and men could not cling to it successfully or safely let it go. There was the War, and the westward expansion, and the lines of commerce that flowed east and west but seldom north and south. The bitter years of Reconstruction resulted in a lean and grinding poverty, a poorness the more pitiful for its stoic acceptance by a proud people. And we know that poorness yet: Look at the *Statistical Abstract.*

Defeat. Poverty. And Woodward adds to these two grim horsemen still a third: a sense of guilt. While the rest of the Republic has basked complacently in its own virtue, the South's preoccupation has been with guilt, not with innocence, "with the reality of evil, not with the dream of perfection." To Woodward's shrewd insight, I would add a few reflections of my own. This preoccupation with guilt and this reality of evil have not been burdens the South has felt it could regard honestly as entirely its own responsibility. The "peculiar institutions" of slavery and segregation have descended upon the South like pregnancy upon a woman whose lover has ridden away. The New England slavemasters had their fun, and made their dreadful profits, and sailed off to Maine; and they left the South to raise the alien child. Oh, it was a willing union. It was not rape, not seduction. The Southerners who bought the frightened blacks lived for a hundred years in agreeable sin with the European and New

England slavers who sold them. But when the assignation ended, the South had all the problems, and the North had all the answers. Thus the preoccupation with guilt is mixed with a resentment for hypocrisy; and when the North speaks loftily to the South, and asserts that we of the North are holier than thou, three hundred years of skepticism seek an outlet: Pray, sirs, since when?

This should be said, too, about Woodward's "reality of evil." Surely there have been evils in the South's policies of racial separation. Poor as the South was, in the sixty years after Reconstruction that preceded World War II, much more could have been done, and should have been done, to encourage the Negro people closer to a cultural and economic equality. I have said it countless times, and say it willingly here: If the South had devoted one tenth of the effort toward keeping schools equal that it devoted to keeping them separate, *Brown* v. *Board of Education* would not have created so dramatic a crisis. Yes, there have been evils, and very real and poignant and tragic evils, in the South's treatment of its Negro people.

But I would raise the question if the "evils" have been all on the side of the white South. *All* of them? The reality that the South has had to cope with most constantly, beyond the realities of defeat and poverty, is the reality of the Southern Negro. Other races of men, caught at the bottom of the ladder, have clambered up. The identical decades that saw Negroes set free in the South saw the Irish set down in New England. "No Irish need apply." The signs hung outside New England mills as uncompromisingly as the "white only" signs outside an Alabama men's room. Who would have imagined in, say, 1880, that a Boston Irish Catholic would be President? But the Irish fought their own way up, on merit and ambition and hard work. They *made* a place at the table. They won acceptance, and they paid their own way.

No such reality has been visible in the South. Instead of ambition (I speak in general terms), we have witnessed indolence; instead of skill, ineptitude; instead of talent, an inability to learn. It is all very well for social theorists to say of Southern Negroes that they are *capable* of this, and their *potential* is for that, and if it were not for segregation and

second-class citizenship and denial of opportunity, they would have achieved thus and so; but the Southerner, to paraphrase Burke, is not so much interested in determining a point of metaphysics—he is interested in maintaining tranquility. The Southerner may dwell more than others upon the past and brood more intently on the distant future, but in his daily life he has to be concerned with the here and now—in brief, he has to be concerned with reality.

The first reality he faces squarely is the one reality most often shunned: the *inequality* of man. The typical Southerner, out of the observation and experience of his lifetime, would accept Burke's thesis that universal equality may exist, but only as the equality of Christianity—moral equality, or, more precisely, equality in the ultimate judgment of God. He knows that "no other equality exists, or may be imagined to exist." The South holds small enthusiasm for egalitarian doctrines based upon the infinite perfectibility of man. With John Adams, who would have made a splendid Southerner, we know that men are foolish; that men are not benevolent; and we regard this as a normal condition of existence. Theoretically, to be sure, men are born to equal rights; but empirically, for good or ill, these rights are incapable of equal exercise. All men are not born with equal powers and faculties, said Adams, "to equal influence in society, to equal property and advantages through life." These are realities, and the Southerner as Realist accepts them.

It is necessary, even in the most affectionate examination of the South and its case before the bar, to insert a number of qualifications and to take account of some dismaying contradictions. The South, I have said, is a distinct political, cultural, and social entity, knit together by hundreds of years of shared experiences. But it was a lively and a valid question, in the postwar decade that preceded the *Brown* decision, whether this entity would survive. On every hand the "New South" was heralded; the rural tradition was dying, and bulldozers were ripping up the groves of the Nashville agrarians. The provincialisms that had distinguished the South, sometimes mocked, sometimes admired, seemed to be on the way out: Southern cooking, the Southern accent, the South's pride

in being Southern. Dixie, it was said, was rejoining the Union; soon it would rejoin the twentieth century.

The future of "Southern nationalism" still seems to me a valid question. Does it have a future? In the years that followed immediately upon the *Brown* decision, make no mistake, the essential unity of the South was abruptly revived. Mr. Chief Justice Warren's gavel echoed the guns of Sumter, and the "Southern Manifesto" in Congress rang with the sound of bugles. Every latent instinct in the mind of the traditional South rose to the fore: States' rights, strict construction, resentment of central authority, deference to the past. The Southerner as Conservative found his principles outraged; the Southerner as Romantic saw his dream castles besieged by barbarians; and the Southerner as Realist, with a sense of dreadful foreboding, turned to the coming storm.

The *Brown* decision operated with galvanic force upon the South; but as this is written, eight years after *Brown*, it is apparent that the electric shock has lost at least some of its impact. The South, in many respects, is still one; but the prodigious energies that were set in motion after World War II are beginning to reassert themselves widely. If one reads the recent Messages and Inaugural Addresses of Southern Governors, he will find segregation barely mentioned. Everywhere, the emphasis is on industrial promotion, tourist promotion, expansion of higher education. The problems that increasingly absorb Southern legislatures are problems common to such bodies across the Republic—taxation, highways, mental health, the control of air and water pollution.

In brief, I doubt that "the Negro question," by which is meant the fear of integration and of a revolutionary Negro ascendancy, will provide a sufficient force, in itself, to keep the South welded together. The fears of 1954 are subsiding, as it becomes apparent that there will be no significant integration (not in the definitive sense in which I use the word, as a condition quite distinct from "desegregation"); and we observe that the revolution so many Northerners jubilantly anticipated in *Brown* is not to be a two-day *coup d'état*, but a thirty-year Peloponnesian War. Beyond the borders of Georgia, Alabama, and Mississippi, interest wanes. In Virginia, the assignment of a Negro child to a formerly white

school now rates a two-inch item on *The News Leader's* page 48.

What of the other common themes that tie the South together and make the region distinct? What of Southern conservatism? What of the Southern manner? These traits will endure, I believe, though a wry acknowledgment may be made of persuasive evidence to the contrary. It is perfectly true that the Conservative's traditional animosity to centralization has a way of disappearing in the South when bills are called up in the Congress to support cotton, and peanuts, and tobacco. The Conservative opposes socialism and all its works; it is his favorite devil; but the steam plants of the TVA seem to be marvelously exempt from his anathema. It was a Georgian whose name was longest and most lustrously identified with foreign aid, and an Alabaman whose plan of Federal subsidies for hospitals bears his name, and an Oklahoman who has led the Liberal forces in behalf of a Federal program of medical care. The case for "Southern conservatism" totters before the voting records of Kefauver, Gore, Fulbright, Sparkman.

The defense would respond to this indictment by saying that all things are relative, and in an increasingly Liberal society, it is only the political center that has moved. The old Conservative instincts remain, and if they have been much corrupted, they still manifest themselves in a hundred ways not necessarily susceptible to roll-call vote. A wise and enlightened conservatism does not resist all change; it resists what it views as impulsive change, or change simply for the sake of change, and this tendency, I believe, remains more apparent in the South than in other regions. We still resist abrupt innovation, in art, music, literature, architecture, religion, public morals. Other regions, in our view, should be the first to lay the old aside. Instead of casting away all our old prejudices, as Burke once remarked cheerfully of English Conservatives, "we cherish them to a very considerable degree, and, to take more shame to ourselves, we cherish them because they are prejudices; and the longer they have lasted, and the more generally they have prevailed the more we cherish them." This process of cultural husbandry, this laying by, has been too long ingrained in the South. I cannot

imagine its abandonment any time soon.

The South's identification with "conservatism" will survive, among other reasons, because it fits so perfectly into the real or imagined Southern manner. These days, liberalism is identified with the masses, and not merely identified with them but equated with them. The race issue to one side, this equation simply is not a process that comes easily to the Southern temperament. Implicit in the conservative faith is a high respect for individual variations, for class, and order, and rank; and all these are implicit in the Cavalier ideal as well. Aristocracy is wasted in a shower room; and to the extent that public institutions are reduced to the level of a public bath, the Southerner is bound to object. The graces, the little elegancies, the privileges of birth and office and position—these too are long ingrained; they persevere.

To be sure, a good deal of cynical evidence may be amassed to suggest that this Southern manner, this Southern romanticism, is as unreal as the myths on which it is based. When a gang of foul-mouthed Mississippi white men lynch a fifteen-year-old colored boy, the Southern manner seems a long way away. And when a rabble of black-jacketed young punks assemble to jeer at law-abiding Negro students, notions of *noblesse oblige* may seem just that: notions.

But if Southern conservatism may yield now and then to the temptation of the pork barrel, and Southern romanticism be attenuated by the impatience of an impatient age, the last of my four threads may prove stronger than ever: Southern realism, and with it, the tradition of Southern defeat. For decades to come, despite the phenomenal population shifts (and in many instances because of these population shifts), the South will have to live realistically with the interracial realities it alone, among all the regions of the country, has known well. "It is a condition which confronts us," said Cleveland of the tariff, "and not a theory." Just so with race relations in the South. The gentlest concepts of brotherhood, the broadest reaches of the law, the finest theories of integration, go through a sea change in crossing the Potomac. These comfortable Liberal attitudes emerge from the gauzy mists of illusion and encounter the blazing sun of fact: *These* rural schools, *these* country people, *these* children, white and black,

in *these* particular towns and villages. The Negro is not moving in any substantial numbers to the remote rural counties of the North; he is moving predominantly to the cities, where everything works in his favor during a period of transition: job opportunities, the melting-pot tradition, the impersonal anonymity that protects him in a larval time. Yet millions of Negroes remain back home in the South, salt-and-peppered across the rural countryside, and they and their problems and aspirations are daily, personal realities to the Southerner. He knows he must cope with them somehow.

And the Southerner knows more than this. He knows, in the marrow of his bones, that new defeats are entirely probable. He takes this much profit from the lessons of the past, that he learns something for the future. Desegregation, as a legal principle, is accepted inwardly by many of the Southerners who cry out most vehemently against it. Something of the spirit has been surrendered. One more defeat has been experienced, and we know it. In the first few years after *Brown*, we perceived in this judicial Gettysburg nothing finally decisive. The talk then was of sending Governors to jail, or of challenging the Justice Department to arrest whole legislatures. Let them call out the troops! Well, Mr. Eisenhower did call out the troops; and our Governors had second thoughts about going to jail, and not even the Louisiana legislature could devise a way to get itself arrested. Little by little, the hopeless conviction has begun to seep in that it has happened again, that the courts really *mean* this, that so far as laws and litigation are concerned, nothing remains but the long road to Appomattox. Proud Virginia gazed upon the voluntary desegregation of her schools with bitter distaste, but in the end we were like Byron's heroine who "vowing she would ne'er consent, consented." Defeat.

And yet; and yet. The fabric of the South is snagged with a beggar's lice of contradictions. The jesting exhortation that the South will rise again has a hard kernel of truth at the bottom. It is precisely because the South has experienced defeat, again and again, in Nullification, in the Missouri compromise, in the War, in Reconstruction, in the postwar generations, time and again, in contradiction to the success of our neighboring regions, that defeat has become an old

friend. We meet it, and survive; we rise again. And paradoxically, the prospect of defeat in lunch counters, waiting rooms, public schools, places of assembly, is no harbinger of ultimate despair; the prospect is an old friend, the face of defeat, and in the South it is a symbol not of disintegration but of unity. Misery loves company. It does, indeed; oh, it does indeed! And we are our own best company.

I speak with a mild cynicism, and do not mean to: It floats to the surface. The mystical entity that is the South is held together, in a lovely, helpless, hapless bond, by its consciousness of the Negro, by its abiding conservatism, by its dedication to romanticism, and by its inexorable sense of realities, and whenever one of these threads wears thin, another is redoubled and twice twined together to knit the fabric whole. The defeated South is never wholly defeated; the romantic South cannot be wholly disillusioned; the conservative South can flirt with liberalism and remain as chastely conservative as before; and to the twin inevitabilities of death and taxes we philosophically add a third: the Negro, *in saecula saeculorum*, world without end. Amen.

V

Let me move on, may it please the court, with fewer digressions and random interpolations, to the South's case against "integration." The quotation marks are intended to suggest that the noun has a distinctive meaning. This is as good a place as any for a definition of terms.

Increasingly, in the Southern lexicon, words that are used interchangeably elsewhere in the country have come to take on a special and well-understood meaning. By "segregation," for example, we now mean the body of practices enforced by State or local law. Prior to *Brown*, our schools were legally segregated. As this is written (though probably not for long), places of assembly, athletic contests, certain public records, also are segregated by law in several States. As these laws and institutions one by one are bowled over by court decree, a process of *desegregation* sets in. It is an abominable word, by any philological standpoint, as madly illogical as "irregardless" or "inflammable," but a new spirit of lexicog-

raphy is abroad in the land: Whatever is, is right. Our schools, save in Mississippi, Alabama, and South Carolina, are entering upon desegregation.

By racial *separation,* we mean something much less precise. In almost every aspect of Southern life, the races are separate, though not necessarily (or even very often) are they segregated. Day in and day out, white and Negro inevitably are thrown closely together in the South—shopping in stores, working in factories, riding in elevators and buses, standing in queues at banks or liquor stores or post offices —but this is the normal condition of existence. I have termed it an intimate remoteness. It is a condition that goes beyond the ordinary impersonal encapsulation of strangers; it is a subconscious recognition that ours are separate races, separate worlds. This does not imply that there is no communication. On the contrary, the Southern white and the Southern Negro are gregarious animals; thrown temporarily together, they will make agreeable conversation: "Think this rain will ever stop?" "It suttinly is po'in, it is that." This is the relationship that conditions all human intercourse in the South. A murder has been committed; the police reporter's first question, before he thinks of who or where or why or when, is simply "white or colored?" A candidate qualifies for public office: Is he white or colored? News values start from this point. (Even as I write this paragraph, the telephone rings, and it is an informant at the State penitentiary calling to tell me that clemency has been granted a prisoner in death row. I am not familiar with the case. "White boy or colored boy?" I ask. Doubtless it makes no difference; they are equally fallen sparrows, but the question is automatic, instinctive, inescapable. It is a consequence of racial separation, and this is a part of the world we live in.)

Finally, by way of definition, *integration* has come to mean a willing suspension, or abolition, of the state of mind I attempt to convey by *separation.* So defined, integration is almost nonexistent in the South. The term embraces the complete and unrestrained intermingling of races, on terms of social equality, without constraint of any sort; it is color-blindness, voluntarily accepted; it is more than mere joint membership on civic committees or school boards. And it is

not something that can be achieved by writ of mandamus. A court can impose a legal condition of desegregation, and thus put an end to segregation; but a court cannot enjoin separation and thus achieve integration. The arm of the law, long as it is, cannot reach into certain areas of the human spirit.

It would be pointless, at this late stage, to prepare even a hypothetical brief directed wholly against "desegregation." The desegregation of public institutions is a *fait accompli.* True, the process is far from complete; in the Deep South, in this late spring of 1962, the process has not even begun—and I would not hazard a guess when it will begin, or be complete. No time soon. But my thesis here is primarily the South's abhorrence of integration, and especially the South's continuing stubborn resistance to a widespread desegregation of the public schools that fearfully would result in integration of the races. Why is the South resisting race-mixture in its public schools?

I am going to suggest three primary reasons. Other writers about the South might put them down as five or ten or fifteen reasons, but in the end perhaps we would cover the same points. Mine are, first, the arguments of anthropology; second, the arguments of practicality; and third, the arguments for gradualism.

VI

On the first point: The South earnestly submits that over a period of thousands of years, the Negro race, as a race, has failed to contribute significantly to the higher and nobler achievements of civilization as the West defines that term. This may be a consequence of innate psychic factors. Again, it may not be, but because contemporary evidence suggests little racial improvement, the South prefers to cling to the characteristics of the white race, as best it can, and to protect those characteristics, as best it can, from what is sincerely regarded as the potentially degrading influence of Negro characteristics.

Now, that is a "racist" thesis, and if one would listen to no more than the horrified gasps of the Liberal left, the very statement is a dreadful example of racism at its worst. Hit-

lerism! Fascism! Kluxism! White supremacy! To the doctrinaire theologians of a Liberal socio-anthropology, the thesis is blasphemy, and it is mortal sin even to consider it. A Group for the Advancement of Psychiatry, in May 1957, denounced such heresy in unequivocal terms: "The *fact* is, *of course*, that the Negro possesses the same capacities and potentialities as does the white."

But if this is a *fact*, how did it get to be a fact? How "of course"? Is the question of innate aptitudes and characteristics no more arguable than the sum of two plus two? Is the flat statement that "the Negro possesses the same capacities and potentialities as the white" to be regarded on a level with "Washington was the first President," or "the square of the hypotenuse of a right triangle is equal to the sum of the square of its other two sides"? If this "fact" has in truth been so positively established, discussion of the subject is wholly pointless; nothing remains to be said, and those readers whose minds are closed to reconsideration will flee from these pages and soothe their wounded sensibilities with the balm of Ashley Montagu's hairless prose.

But those who are agreeable to pursuing truth, *wherever the quest may lead them*, will stick around; they will keep their minds open; they will acknowledge at least an outside possibility that the disciples of Boas and Klineberg could be in error; they will formulate questions, and they will insist upon honest and straightforward answers to them. And if intellectually satisfying answers to their questions cannot be adduced, they will honestly acknowledge at the end: *The question is still open.*

Now, that is all the defense can ask. Few Southerners have made any serious attempt to read up on anthropology or to acquaint themselves with the results of intelligence tests. Their judgments and attitudes—or if you please, their prejudices—are based largely upon personal observation, instinct, upbringing, the cumulative experiences of a lifetime, stored up day by day and hour by hour. An advocate for the South does not wish to be dogmatic. He does not insist that the South has all the right answers. He does not say, "the *fact* is, *of course*." But the South does suggest that it raises some of the right questions.

Even to raise the right questions has become an almost impossible undertaking in today's emotionally charged atmosphere. For the past twenty years at least (I write in 1962), a systematic and well-financed campaign has been under way to obliterate the entire concept of race. This calculated perversion of honest scholarship has drawn a rebuke from Dr. Carleton S. Coon, one of the world's foremost anthropologists, who himself believes that classification by race "is a nuisance." In *The Story of Man,* Coon departs from his masterly narrative long enough to register a serious protest against the activities "of the academic debunkers and soft-pedalers who operate inside anthropology itself."

"Basing their ideas on the concept of the brotherhood of man," Coon comments sharply, "certain writers, who are mostly social anthropologists, consider it immoral to study race, and produce book after book deploring it as a 'myth.' Their argument is that because the study of race once gave ammunition to racial fascists, who misused it, we should pretend that races do not exist. Their prudery about race is equaled only by their horror of Victorian prudery about sex. These writers are not physical anthropologists, but the public does not know the difference."

Typical of the doctrinaire Liberals who shrink from the very notion of race are the scientists who make up the Group for the Advancement of Psychiatry. In their disdainful view, race is no more than a "myth." In particular, the Group denounces the "myths which have grown up about the Negro." These "myths," it is said, serve merely to rationalize and to justify the white man's disparaging attitudes, because he cannot clearly recognize or understand the real source of his prejudice. We should realize, says the Group, that such "myth formation" psychologically seeks to protect individual and group security; and if we realize that, we can better understand why the "myths of prejudice" are so resistive to logic: The powerful need for safety, which "the myth" is created to insure, explains why it is clung to despite facts and logic to the contrary. Moreover, the damaging consequences of "racial myths" are misconstrued as evidence to support them.

Ashley Montagu has suggested, in *Human Heredity,* that

the very word *race* be struck from the English language. There is, he says, "sound sense in the argument that the long-standing abuse of the meaning of a word constitutes the best reason for its total exclusion from common usage." Unsound words make for unsound ideas, and the unsound ideas tend to result in unsound action: "The word 'race' is a horrid example." To Dr. Montagu, race is a notion, a myth, a fallacy, an error. In the sense that the term suggests distinguishing characteristics on the part of a particular people, "the word is beyond rescue and it had better be dropped altogether." He suggests that the term "ethnic group" be employed instead, and the most he will concede is that "slight differences may exist between some ethnic groups in the frequencies of certain genes underlying mental capacity." This is possible, says Dr. Montagu, "but in spite of all attempts, no one has, in fact, ever demonstrated that they do."

Otto Klineberg, who cannot bring himself to write the words *race* or *racial* without putting them in quotation marks, says the same thing: "In all probability, inherent intellectual differences between Negroes and whites do not exist." Other writers—Kenneth Clark and Ruth Benedict, for example—are impatient with such academic impedimenta as "probabilities." More in anger than in sorrow, they denounce the bigoted Southerner who dares to suggest that in terms of his capacity to adjust fully to Western values, the Negro may be innately inferior. The very idea! And any recourse by the Southerner to history, as Miss Benedict puts it, is mere "special pleading." All good historians know of the greatness of Negro achievements. To doubt this truth is to substitute for historical processes "an unashamed racial megalomania." This is a "travesty of fact."

In 1960, a group of distinguished anthropologists, psychologists, and social scientists, rebelling against the obstinate attitudes of the Benedict-Montagu school, launched a small publication in Edinburgh, *The Mankind Quarterly*. They ventured to suggest that some of these questions of "race" are not altogether closed; they commented that it was a pity to see responsible scientists so influenced by emotion and political bias that they had closed their minds to ob-

jective inquiry; and the editors proposed to publish occasional monographs exploring aspects of these issues that were banned from exploration elsewhere. *Mankind Quarterly* scarcely had raised its mild voice before shrill cries from the Liberal left united in a ritual chorus of denunciation. Late in 1961, the chief editor, Dr. R. Gayre of Gayre, replied to his assailants in an editorial that sums up so much of the Southern view on these matters that I should like to quote from it at some length. He began by expressing regret that persons who do not slavishly subscribe to egalitarian dogmas should be denounced automatically as "racialists" and their teachings condemned as "racism." He continued:

> The fear of being so abused has for the last one or two decades been sufficient to silence many, if not most, scholars and prevent them from writing what they believed and thought to be the facts in connection with anthropological subjects. They have, in the main, confined themselves to negative action, such as protesting when the notorious UNESCO pamphlet on race was produced, and being happy to gain, as a result, some modification of the more extreme and nonsensical assertions of the a-racist egalitarians.
>
> That there has been such a clearly marked reactionary influence, if not domination, over our studies, is so patently obvious that it hardly needs to be stressed. Even those who have not subscribed to any form of political doctrine have felt it safer to make interpretations of the facts of race and heredity in such terms that they can bear a clearly egalitarian interpretation. . . . The anxiety which is shown to suppress publications and expositions which do not support egalitarianism is entirely consistent with this political direction of, and domination over, science. . . .
>
> [W]e wish to state categorically what are the views of the editors on the matter of racial equality. While rejecting racial egalitarianism as having no warranty in honest scientific expositions and investigations, we do not, on the other hand, subscribe to doctrines of racial *superiority* or *inferiority*. We believe that just as all individuals within a particular stock are different, so is one racial group in relation to another. In respect of some characters, various stocks will be superior to others; and in other

cases inferior; but in many cases no perceptible differences may be apparent. While environment, both physical and social, may influence these characters, we believe that heredity is by far the most important single factor, and the current fashion to eschew the significance of heredity is a definite disservice to the understanding of what makes for differences in the various characters which distinguish one group from another.

Furthermore, we do not presume to judge what is desirably superior or not. We think that within the ambit of the type of civilizations erected by the White–Brown stocks or the Yellow races, the Black, which has shown no natural predilection to that form of organization, will be at a disadvantage in any competition—and is *in that sense* inferior. After all, *a priori* considerations alone would lead to this conclusion, and if modern science thinks this is not the case, it has yet to show why and how the Melanoids have remained technologically backward compared to both the Mongoloids and the Caucasoids. For the Egyptian civilization, which was basically Caucasoid (Mediterranean, Atlantic, Nordic, and Armenoid strains being the basis of that nationality), abutted on the Negroid world of Africa, and its ideas were there to be accepted and copied, so that urban technological civilizations could have been erected in Africa, if that way of life had appealed to the inherent Negroid genius and temperament. It is only within this last millennium that certain ideas generated in Egypt four millennia ago began to reach West Africa—long after the Nile Valley civilization had decayed and disappeared.

H. L. Mencken once remarked that the most costly of all follies, which he viewed as the chief occupation of mankind, is to believe passionately in the palpably not true. The aphorism applies with special force to the Negrophile social anthropologists who are so passionately determined to propound that which is palpably not true, or at least palpably not demonstrable, that in their zeal of advocacy they lose all sense of proportion. Thus, in their raptures, the most primitive mud-hut cultures of the Congo must be praised for their "sophistication" and "complexity." Crude works of art tend to be equated with the sculpture of Periclean Athens. In the rhythmic thump of an African tom-tom, they find

black Beethovens at work. Miss Benedict, in *Race: Science and Politics,* is fairly transported. Her technicolor illusions of African history produce "great kingdoms of wealth and splendor . . . great political leaders . . . men of wealth . . . the spread of higher culture." In seventeenth-century Nigeria, she sees "prized cultural achievements," and of these African tribes she girlishly cries that "their elaborate and ceremonious political organization, the pomp of their courts, the activity of their far-flung economic life, with its great market centers and tribute collected over great areas, their legal systems with formal trial of the accused, with witnesses and with prosecutors—all these excite the admiration of any student."

Well, one is reminded of Mark Twain's comment that there is something fascinating about science: "One gets such wholesale returns of conjecture out of such a trifling investment of fact." Let it be granted that there is much of archeological and anthropological interest to be found in the obscure and sketchy "histories" of various African kingdoms and empires. One might wish, abstractly, to know more of the Ghana Empire, the Almoravid Empire, the Mali Empire, the Songhai Empire; the teachers and the curriculum and the libraries of the Universities of Timbuktu and Sakoré might usefully be contrasted with those of the Universities of Paris and Bologna; we should like standard reference works that offered full and scholarly expositions of the kingdom Miss Benedict terms the "culmination" of African civilization, the "great empire of Bornu." It is an empire not even mentioned by Herskovits in *The Myth of the Negro Past* and barely touched upon by J. D. DeGraft Johnson and W. E. B. DuBois in their works on African civilization. (DuBois does say that Bornu, a Northern Nigerian kingdom, had in the tenth century a civilization that "would appear to compare favorably with that of European monarchs of that day." It is an assessment that leaves very little to the Carolingians, and it is the sort of tossed-off grandiloquence of the Negrophile propagandist that leaves the ordinary student more mystified than informed.)

In terms of enduring values—the kind of values respected wherever scholars gather, in the East no less than in the

West—in terms of values that last, and mean something, and excite universal admiration and respect, what has man gained from the history of the Negro race? The answer, alas, is "virtually nothing." From the dawn of civilization to the middle of the twentieth century, the Negro race, as a race, has contributed no more than a few grains of sand to the enduring monuments of mankind.

One finds no pleasure in rendering such a judgment; one finds no more than the cold comfort of truth, and even that chilly companion is made the less attractive by the disdain in which this unappealing truth is held. Yet the serious students of the South's position, like the serious pathologist examining an especially distasteful object, ought not to be deterred. If the South is wrong in this appraisal of the contributions of the Negro race (or "culture," or "ethnic group"), then evidence of this wrongness should be readily attainable in standard works of reference; such evidence should be convincingly documented, objective in its nature, susceptible of proof by accepted tests of scholarship.

Well, then, where is this contrary evidence? What library houses the works of a Nubian Thucydides? Who was the Senegalese Cicero? One plows in vain through the works of a score of apologists. In the volumes of the most sympathetic Negrophile writers, one finds little but conjecture, surmise, vague assertions that thus and so "must have been true." What are the contributions of the Negro culture to enduring art, or music, or literature, or architecture? To law, jurisprudence, government? To science, invention, mathematics, philosophy? Here was a race, if the horrid word may be used (or a culture or subculture or ethnic group), that lived for thousands of years in effective possession of one of the richest continents on earth. Here were a people who lived by the sea, and never conceived the sail; who dwelled in the midst of fantastic mineral deposits, and contrived no more than the crudest smelting of iron and copper. The Negro developed no written language, not even the poorest hieroglyphics; no poetry; no numerals; not even a calendar that has survived. Even so skilled a defender as Toynbee has to conclude, after a desperate flurry of coughs and sighs, that the Black Race is the only one of the primary races "which has not made a

creative contribution to any one of our twenty-one civilizations." Breasted, who wrote in a more objective time, before fashions of social ideology tended to warp critical judgment, says bluntly that "the Negro peoples of Africa were without any influence on the development of early civilization."

Franz Boas, the father of "modern" social anthropology, posed the South's question in this fashion in *The Mind of Primitive Man:* "Have not most races had the same chances for development? Why, then, did the white race alone develop a civilization which is sweeping the whole world, and compared with which all other civilizations appear as feeble beginnings cut short in early childhood, or arrested and petrified at an early stage of development? Is it not, to say the least, probable that the race which attained the highest stage of civilization was the most gifted one, and that those races which have remained at the bottom of the scale were not capable of rising to higher levels?"

Boas' answer to his own rhetorical question, needless to say, is that most races have not had the same chances for development, that "the claim that achievement and aptitude go hand in hand is not convincing," and that "the earlier rise of civilization in the old world . . . is satisfactorily explained as due to chance." He finds nothing to persuade him that "one race is more highly gifted than another," and besides, he insists, Western critics ought not to judge other races by their own standards. For example, an "impression" exists that primitive men, and the less educated of our own race, have in common a lack of control of emotions; it is thought that they give way more readily to an impulse than civilized man and the highly educated. This impression, says Boas, is entirely unjustified. Too often the traveler or student measures fickleness by the importance he himself attributes to the actions or purposes in which primitive men do not persevere, and he weighs the impulse for outbursts of passion by his own standard. The white traveler, to whom time is valuable, is impatient and irritated at Negro porters, to whom time means nothing. The proper way to appraise the Negro, Boas tells us, is to consider his behavior in undertakings which he considers important from his own standpoint. So considered, the differences

in attitude of civilized man and of primitive man tend to disappear.

This line of defense has a certain plausibility and merit; divorced from reality, it provides a fine topic for a sophomore's term paper. But the American South is an inheritor of Western civilization; the South's values are the values of the West, and it understandably must be concerned with the capacity of the Negro people for contributing to these values. The Ubangi's mud huts may be the most artistic mud huts ever set out in the sun to bake; by tribal esthetics of the African bush, the Ashanti may be vastly more cultured than the Yorubas, and the Balubi superior to the Mogwandi. Or vice versa. These critical judgments are interesting. They are irrelevant, too.

The question that never seems to be convincingly answered is *why* the Negro race, in Toynbee's phrase, is the only race that has failed to make a creative contribution to civilization. What can account for the singular failure of the Negro people, alone among the major divisions of man, to enter the mainstream of political, cultural, and economic history?

The first rationalization that is given is that the physical conditions of sub-Saharan Africa imposed such fearful disadvantages that the development of a "civilization" was patently impossible. The argument simply will not hold up. As many geographers and anthropologists have observed (in a day before such observations were reviewed as blasphemy), parts of Africa were perhaps "uninhabitable," but other parts were not. In any event, the jungles of the Congo imposed no obstacles to Negroid peoples greater than those faced by the Mayans in the jungles of Chiapas.

And consider the Mayans: They carved out of the rain forests of Yucatán—out of an area Van Hagen has termed "the least likely place one would choose for developing a culture"—a civilization that can be identified, and studied, and photographed to this day. They raised great temple cities: Tikal, Uaxactun, Calakmul. They built roads and reservoirs. They developed complex ideographic writing, a twenty-day lunar calendar, a code of laws for crime and punishment, a flourishing industry in dyeing and weaving. To compare the

crude phallic fetishism of Negroid tribes with the highly developed art of the Mayan and the Incan civilizations is to engage in a travesty upon critical judgment.

It is complained of the early Negroes that they were "isolated," that no maritime access was possible to the African interior, hence that they had no opportunity for contact with the cultures of Europe and the Mediterranean. This is a specious argument, too. Every standard history of Africa makes plain, implicitly or explicitly, that early Negroes did indeed have contact with the outer world. Phoenicians, Arabs, Libyans, Hamites all found their way across Africa. Romans came, and Persians, Chinese, Turks, Berbers, Indians, Portuguese. Nothing aroused the Negro from his primitive sleep. He did not adapt. He did not copy. He did not profit.

In 1525, when Pizarro invaded Peru, he found a magnificent Incan civilization flourishing in the almost impenetrable fastness of the Andes. Here, indeed, was isolation from the currents of European thought! No maritime access here! Yet the Incas had built temples and labyrinths and massive palaces of stone. The palace at Cuzco offered fountains, heated pools, intricate goldwork, and polished stones. There were public granaries, a three-hundred-mile road, a decimal system, an advanced astronomy. European explorers who sought trade in Africa found nothing there to compare with this. As Nathaniel Weyl has written, the decisive fact is that centuries of intermittent contact with the growing culture and technology of the West "did not serve to stir the Negroes from their millennial torpor, to quicken their minds and prod their curiosity, to induce them at least to borrow if not to invent."

Franz Boas has sought earnestly to explain all this away. So has Basil Davidson in *Lost Cities of Africa*. So has W. E. B. DuBois in *The World and Africa*. So has Johnson in *African Glory*. But when it comes down to evidence acceptable to rational appraisal, their romantic conjectures fall pitifully short of the minimum requirements of objective scholarship. It is possible to accept Boas' judgment that some African wood carvers and potters have produced work "original in form, and executed with great care." Coon's slightly more enthusiastic appraisal is that Africa's Negro tribes "developed social systems of considerable complexity and a high art, the quality

of which the white world is just beginning to appreciate." There is merit in a thoughtful appraisal by the Oxford anthropologist, E. E. Evans-Pritchard, of the complex system of witchcraft, oracles, and magic that he found among the Azande tribe of Central Africa. *Granted certain postulates,* he says, inferences and actions based upon a system of witchcraft are sound. But is Western civilization really prepared to "grant the certain postulates" of witchcraft in order to find a rationale for praising African culture? No. Let it be conceded that certain African arts and crafts reached a tolerably interesting stage of development. Modern dance and contemporary jazz doubtless owe much to the instinctive rhythms of ancient tribal rites. But south of the Sahara there was no literate civilization, no intellects at work to comprehend and solve the abstract problems; and Western Europe was not built by basket-weaving.

Let us move along. The story is told of a conversation between Boswell and Dr. Johnson, in which Boswell mentioned Bishop Berkeley's theory of the nonexistence of matter. Boswell said he was satisfied the theory was not true, but he confessed he was unable to refute it. Whereupon Dr. Johnson kicked a large stone until his foot rebounded from it. "I refute it *thus,*" he said. There comes a time when the common, uncomplicated observation of ordinary men makes better sense than the partisan inventions of social anthropologists. Against their gauzy dreams of African "civilization," the obscenities of the Mau Mau and the atrocities of the Congolese provide reality as hard as Dr. Johnson's stone. One refutes it *thus.*

In 1944, Otto Klineberg brought together in one volume several of the monographs prepared by American students on the Negro as background memoranda for Dr. Gunnar Myrdal, the Swedish sociologist whose subsequent *An American Dilemma* was to be seen generally, and influentially, by the Supreme Court of the United States. The first paper in Klineberg's collection was put together by Dr. Guy B. Johnson, professor of sociology and anthropology at the University of North Carolina. Dr. Johnson served for three years as executive director of the liberal Southern Regional Council; he is a trustee of Howard University. These credentials strongly suggest that Dr. Johnson was picked by the Myrdal team to

describe "the Stereotype of the American Negro" on the assumption that he would summarize the popular conception of the Negro only to say, in the end, that there isn't a word of truth in it. If so, the Myrdal associates must have been startled by the blunt memorandum Dr. Johnson prepared. He went through the works of thirty-one representative Negro writers and forty-two representative white writers, covering the entire spectrum of political coloration, and boiled down his findings under twelve headings. His list, he emphasized, was not a list of "race" characteristics. It was "a descriptive list, based upon a fair degree of consensus, of the interests, habits and tendencies which might serve to characterize the 'typical' Negro." This list of "Negro personality and culture traits" follows:

Mental: Relatively low intellectual interests; good memory; facile associations of ideas.

Temperamental: Gregariousness or high interest in social contacts; philosophical or get-the-most-out-of-life type of adjustment; high aesthetic interests; love of subtlety and indirection; adaptability.

Aesthetic: Love of music and dance; oratory and power of self-expression; high interest in and appreciation of the artistic.

Economic: Relatively low interest in material things, such as care of money, property, tools, etc.; line of least resistance in habits of work; relative lack of self-reliance.

Personal morals: Double standard of morals and ethics, i.e., one for his behavior toward Negroes and another for his behavior toward whites; in sexual conduct, higher interest in sex, high sexual indulgence, and larger sphere of permissive sexual relations.

Family and home life: Relatively low solidarity; high frequency of common-law matings and separations; role of mother strong; warmth of affection toward children; high rate of illegitimacy.

Religion and the supernatural: Rather high emotional tone; personalization of God and saints; high interest in "superstition"—i.e., belief in various supernatural forces and ways of controlling them.

Law observance: Relatively high incidence of social disorder; drunkenness, fighting, gambling, petty stealing, etc.; resentment against the white man's law.

Public manners: Tendency toward extroversion in public contact; easy sociability, loud talk; relative carelessness in speech and dress.

Race pride: Not yet highly developed; inferiority feelings common; acceptance of white standards of physioal beauty to a large extent.

Race consciousness and leadership: Lack of cohesion; high intragroup conflict and cleavage; distrust of leaders; lack of strong race-wide leadership.

Now, what does Dr. Johnson say about this Negro "stereotype"? Insofar as the list of characteristics has any validity, he comments, it is more applicable to the Negro masses than to the minority of highly sophisticated and acculturated Negroes. But how much validity does it have? Here was the shocker. For Dr. Johnson himself noted that these same characteristics had been attributed to the Negro by both white and Negro writers; and this being so, "there is more than a slight presumption in favor of the reality of the characteristics." He suggested that the Myrdal associates "assume that after all there is *some* truth or basis of reality to the traits which are persistently mentioned in literature and in popular thinking."

"It is true," Dr. Johnson remarked, "that the whole trend of scholarship at present is to look upon the traits which the dominant group attributes to a minority group as nothing more than stereotypes which have been invented for the express purpose of justifying the position of the dominant group and controlling the status of the subordinate group. These stereotypes are sometimes referred to as myths, the implication being that they have no realistic basis whatever. It should be pointed out, however, that it is probably not necessary for a dominant group such as the white people in America, to invent and perpetuate stereotypes which are wholly unfair and untrue in order to maintain its own status of dominance. . . . The point here being made, which is simple and which rests upon a common-sense assumption, is that the stereotypes which a dominant group develops concerning the traits of a subordi-

hate group will be to some extent based upon observable characteristics in the subordinate group, and that while the stereotypes may be permeated with prejudice and with the ideology of inferiority, *they may still reflect a certain amount of truth concerning the subordinate group.* In other words, if we can deduct from the popular stereotypes the moral judgments and the implications of inferiority and the exaggerations, we may have left a body of belief which affords considerable insight into the traits of the subordinate group." [Emphasis added.]

The Johnson list goes to the very heart of the South's resistance to the desegregation of its public schools. When it is asked why the South opposes integration, one might provide a tolerably complete answer simply by citing Dr. Johnson's twelve summary findings: *This is why.* The most Dr. Johnson will say of the "stereotype" is that it contains a "certain amount of truth." In my own observation, and in the observation of the white South generally, the list contains a vast amount of truth. I would dissent from the Johnson findings on a couple of points only: I doubt that the "Negro masses" (any more than the white masses) have a "high interest in and appreciation of the artistic," and it seems to me the summary of the Negro's typical "public manners" is overdrawn. Since 1943, when Dr. Johnson prepared his summary, a phenomenal growth has taken place in a Negro middle class, and much of the "loud talk" and "relative carelessness in speech and dress" has given way to cultivated speech and to a certain elegance in dress. In my observation, the colored children of Richmond frequently are cleaner, shinier, and more neatly dressed than many of their white counterparts.

In general, however, this purported "stereotype" provides an accurate and faithful mold of typical Negro behavior and personality. Are these traits a consequence of racial inheritance? The overwhelmingly popular view of anthropologists, social and physical, is that these are *not* innate characteristics. The entire school of Franz Boas, embraced by Kluckhohn, Benedict, Klineberg, Clark, Rose, Comas, Montagu, and many others, holds firmly, and in some cases almost hysterically, that whatever lags may be observed in typically Negro culture, as contrasted with typically white culture, these shortcomings are

entirely owing to environment. As the Group for the Advancement of Psychiatry puts it, "these handicaps are a consequence of racial discrimination rather than of racial inferiority."

The view, however, is not unanimous, nor is the manner in which these "environmental" views are advanced universally acclaimed.

"If we in America are going to make any sense out of the Supreme Court's desegregation decision," Dr. Frank C. J. McGurk has remarked, "we will have to be more factual about race differences and much less emotional. We can have our dreams, if we like to dream, but we should be willing to distinguish between dreams and reality. Already, we have gone too far toward confusing these two things. As far as psychological differences between Negroes and whites are concerned, we have wished—and dreamed that there were no such differences. We have identified this wish with reality, and on it we have established a race relations policy that was so clearly a failure that we had to appeal to distorting propaganda for its support. . . . There is ample evidence that there are psychological differences between Negroes and whites. Moreover, these differences are, today, of about the same magnitude as they were two generations ago. These differences are not the result of differences in social and economic opportunities, and they will not disappear as the social and economic opportunities of Negroes and whites are equalized."

Dr. McGurk is associate professor of psychology at Villanova. The quotation comes from his famous (or infamous, depending on one's point of view) article in *U. S. News & World Report* of September 21, 1956. Several years later, Dr. McGurk provided an introduction for Nathaniel Weyl's *The Negro in American Civilization,* in which he expanded briefly on the same theme. Weyl's book, published by Public Affairs Press in 1960, is an almost indispensable work to the student of this subject who is sincerely interested in getting "both sides." (Another valuable work, also published by Public Affairs Press, is Carleton Putnam's *Race and Reason: A Yankee View;* Putnam has driven the Liberal anthropologists practically to apoplexy by the unfair tactic of reading their works and taking them seriously—something no layman is expected to do. The rule is that non-anthropologists must

treat anthropologists respectfully, even when anthropologists write nonsense). Like Putnam, Weyl was raised and educated in the integrated North. He set out to write his book with Northern preconceptions; but the more deeply he dug for facts, the more he discovered that "material which passed for the objective findings of social scientists could more accurately be characterized as rationalizations and propaganda wearing academic cap and gown." He demonstrated the intellectual courage to abandon his preconceived ideas, and to conclude after an exhaustive study that "the presumption is strongly in favor of innate psychic differences."

In his introduction, Dr. McGurk describes Weyl's book as a refreshing antidote to the one-sided, environmentalist argumentation that is all most college students ever receive, and he goes on to urge that from the standpoint of the scientist, the problem of race should be studied in an objective manner: "Appeals to beliefs, morals, ethics, or political philosophy are out of place; the issue is one of fact. . . . Ethnic differences are facts. In the psychic area, these differences are important facts. It seems much more sane to face these differences and investigate their causes impartially than to play ostrich about them."

Let us go back, for a moment, to Dr. Johnson's "stereotype." Manifestly, many of the characteristics he finds most widely attributed to the Negro are incapable of statistical measurement. Empirical data could not well be compiled, for example, on "relative lack of self-reliance," or "love of subtlety and indirection." But one characteristic found to be more typical of the Negro than of the white is "high sexual indulgence, larger sphere of permissive sexual relations, . . . and high rate of illegitimacy." The illegitimacy, at least, can be statistically tabulated, and the appalling facts can be faced.

What are the facts? First, the illegitimacy rate among Negroes in this country is roughly *ten times* the illegitimacy rate among whites. Second, the condition is not improving, but on the contrary appears in many areas to be growing worse. Third, a disproportionately high rate of illegitimacy among Negroes obtains not only in the South, but throughout the United States.

These are the grim figures from the National Office of Vital Statistics:

ILLEGITIMATES AS A PERCENTAGE OF TOTAL LIVE BIRTHS
UNITED STATES, 1940–1959

	1940	*1945*	*1950*	*1955*	*1959*
White	1.95	2.36	1.75	1.86	2.21
Nonwhite	16.83	17.93	17.96	20.24	21.80

Consider the record in two Southern States, Mississippi and Virginia. Here are the figures from Mississippi:

ILLEGITIMATE BIRTHS, MISSISSIPPI, 1935–1960

			WHITE		NEGRO	
		Per cent of all	*Per cent All White*			*Per cent All Negro*
Year	*Number*	*Births*	*Number*	*Births*	*Number*	*Births*
1960	8,407	14.2	388	1.4	8,019	25.0
1959	8,091	13.4	370	1.3	7,721	23.7
1958	7,581	12.8	310	1.2	7,271	22.4
1957	7,815	12.9	272	1.0	7,543	22.2
1956	7,791	12.5	294	1.1	7,497	21.5
1955	7,909	12.5	274	1.0	7,635	21.4
1950	6,778	10.5	283	1.0	6,495	17.4
1945	5,499	10.2	223	0.9	5,276	17.5
1940	4,699	8.9	268	1.2	4,431	15.0
1935	3,978	8.2	265	1.2	3,713	14.1

The vital statistics take on additional meaning when they are translated in terms of human beings. In the five years 1956 through 1960, white mothers in Mississippi gave birth to 1634 illegitimate children. In the same period, Negro mothers gave birth to 38,051 illegitimate children.

Substantially the same picture may be seen in the records of Virginia. Between 1938 and 1958, the white illegitimacy rate in Virginia declined slightly, from 2.6 to 2.3 per cent. In this same period, which witnessed astonishing gains in Negro education, Negro housing, Negro income, and Negro job opportunities, the rate of Negro illegitimacy increased from 19.5 per cent to 22.9 per cent.

The records of five Virginia cities and five Virginia counties of substantial Negro population are entirely typical:

ILLEGITIMATE BIRTHS AS A PERCENTAGE OF TOTAL NEGRO BIRTHS

CITIES

	Richmond	*Norfolk*	*Roanoke*	*Danville*	*Lynchburg*
1935–39	27.2	24.6	25.1	26.6	29.5
1955–58	30.3	22.0	26.6	29.0	28.1

COUNTIES

	Halifax	*Prince Edward*	*Pittsylvania*	*Charles City*	*Greensville*
1935–39	12.4	14.5	12.8	14.3	14.2
1955–58	19.9	21.5	18.6	23.4	22.0

The U. S. Department of Health, Education and Welfare periodically releases data on the nation as a whole. The figures for 1957 illustrate the story. In that year, 1.9 per cent of all white births were illegitimate; 21.7 per cent of all Negro births were illegitimate. Negro illegitimacy ran as high as 27.9 per cent in St. Louis, 29.3 per cent in Atlanta, and 34.6 per cent in Knoxville. The influx of Negroes into Washington, D. C., has given the nation's capital, to the nation's shame, what the Washington *Post* has termed "undisputed first place in illegitimacy." In 1957, nearly 19 per cent of all births recorded in the District of Columbia were illegitimate—5.8 per cent of the whites and 26.5 per cent of the Negroes.

Now, a widespread custom among Negro apologists is to scoff these figures away. It is said, for one thing, that there is "a relatively greater understatement of illegitimacy in the white group than in the nonwhite." For my own part, I doubt this exceedingly. It is said, also, that a greater percentage of extramarital pregnancies are aborted among white girls than among Negro girls. Perhaps. A third line of rationalization typically has been advanced by the *Norfolk Journal and Guide*, a Negro newspaper; this has to do with the fact that slaves were not permitted to marry prior to 1865, though they were encouraged to cohabit, and "it is

foolish to suppose that a suppressed and constantly vilified minority group could wholly recover from the practice in a few generations." A related argument, if it is an argument at all, is that in pre-War times "many white slave-owners promiscuously exploited their slave women sexually." Other rationalizations put some of the blame for Negro sexual looseness on housing, economic opportunity, low income levels, and the like. Generally, it is all charged to the "system of segregation," a charge that tends to collapse when it is observed that the high rates of Negro illegitimacy recorded in the South are not materially different in the integrated climes of Pennsylvania, Minnesota, Illinois, Missouri, and West Virginia.

But the basic validity of the statistics is not entirely discounted, even by Negro commentators. Carl Rowan, the Minneapolis newspaperman who came to the State Department with the New Frontier, faced up to them (after a good deal of preliminary squirming) in *Harper's* in 1961. A leading Negro educator, President Thomas H. Henderson of Virginia Union University, offered some thoughtful comments in a paper delivered before the Virginia Conference of Social Work in 1957. He said:

"Let me begin by saying what the problem of a high illegitimacy rate among Negroes is not. It is not, first of all, a statistical illusion. . . . [T]he illegitimacy rate for Virginia Negroes has been ten times as high as that for whites each year for several decades. After subducting the maximum influence of all possible sources of error in the statistics, the consistency and magnitude of the differential leaves no doubt that a real and disturbing difference exists."

The problem cannot be blamed, said Dr. Henderson, on any particular desire to obtain public benefits under the program of Aid to Dependent Children. Moreover, "it is not to any great degree a problem of racial interbreeding—every indication points to a steady decrease in interbreeding since before the dawn of this century." The problem is "overwhelmingly a problem of illegitimacy with both parents colored." He added:

"The problem is not the result of innate differences between the races. It would be less painful if it were. If the Negro had innate moral weakness or blindness, if he had an

innately inferior intelligence, or in some inborn way either his sex drive or his fertility were somehow different, we could shrug off the problem by saying, 'God made it that way; there's nothing to do about it.' But we are faced with the hard fact that reputable scientists regard as fruitless all efforts to find valid evidence of any innate moral weakness of the Negro or any innate difference in personality, intelligence, or sexual behavior."

Dr. Henderson went on in his paper to summarize many of the mitigating factors earlier mentioned, including socio-economic status, recreational limitations, inadequate sex education within Negro families and schools, and the tensions generated by discrimination. But he suspected that these various factors together do not account for more than half the problem: "Without a statistically valid basis for it, my opinion is strong that the primary factor is that of motivation. *The simple fact is that many Negro boys and girls do not want strongly enough to avoid producing illegitimate children.* The rank and file of those who are at the lowest social levels have not changed their attitude to illegitimacy since the days of slavery when sexual laxness in Negroes was tolerated and even encouraged." [Emphasis supplied.]

A notable comment along that line appeared in the St. Louis *Evening Whirl,* a Negro newspaper, early in 1960, in an account of a colored woman who complained, after giving birth to her ninth illegitimate child, that her allowance under Aid to Dependent Children had been cut from $185 to $110 a month. She felt "discriminated against." Said the *Whirl* editorially:

> Mrs. Brown thinks that she is entitled to live a normal life with a boyfriend and not have to waste money running around hotels and rooming houses. They can't afford it.
>
> Mrs. Brown is young and normal. She is only 29. She cannot stop having a boyfriend and romance now. She believes that poor people are entitled to social pleasures and normal living.
>
> This newspaper agrees with this version of living. The rich have everything they want. Why can't poor people have a little fun? A lot of our foolish laws need changing. 'We do not condemn Mrs. Brown. We rather praise her. She is living proof of a good woman—one who is

promulgating her race.

When our race increases in number to a much larger extent, we can demand more, get more, and show our power and authority at the polls.

This remarkable attitude, which views the sexual act as casually as a good-night kiss, is reported by school administrators and law-enforcement officials among Negroes across the nation. In Philadelphia, District Attorney Victor H. Blanc in 1958 typically reported confiscation of large quantities of pornographic pictures among Negro pupils in the public schools; much of the material was intended to encourage interracial "Sex Clubs" led by Negro teen-agers who regard fornication, in the Negro newspaper's phrase, as "social pleasures and normal living."

Another of Dr. Johnson's characteristics, in the list that made up his "stereotype" of the typical Negro, was summarized under "law observance" as "relatively high incidence of social disorder; drunkenness, fighting, gambling, petty stealing, etc." Here, too, some measurable data may be had. Nathaniel Weyl has summed up the picture succinctly:

"For well over a century the Negro has been responsible for an alarmingly disproportionate share of American crime. In 1950 his felony rate was almost three times the national average. Thirty per cent of the two million persons arrested for major crimes in 1957 were colored.

"While his contribution to all types of crime, except political crime, has been excessive, the Negro has gravitated toward the most serious offenses and, above all, toward crimes of violence. In recent years he has accounted for *well over half* the nation's murders, non-negligent manslaughters, aggravated assaults and robberies." [Emphasis supplied.]

As in the case of illegitimacy, Negro crime rates have not tended to decline significantly with the Negro's rising level of income and opportunity. About 34 per cent of the convicts committed to jail in 1910 were colored; the figure is about 30 per cent for 1960. Historically, Negro crime rates have been higher in the more-or-less-integrated North than in the more-or-less-segregated South. In Philadelphia, where the shockingly brutal murder of a Korean student in 1958 prompted some candid and critical investigations, it

was found that Negro teen-agers, representing 30 per cent of the population, were guilty of 75 per cent of juvenile crime. In one nineteen-day period given special study, Negroes were found responsible for forty-five of fifty-three "headings," in which victims were savagely beaten with clubs and iron pipes; they also were charged with thirty-two of thirty-eight murders and 340 of 437 cases of aggravated assault. Eighty per cent of the inmates of Philadelphia prisons at that time were Negroes. The figures are entirely comparable in New York, where one city magistrate, after hearing an unusually shocking case of Negro violence, asked a rhetorical question that hangs quivering in the air: "What kind of animals do we have in this town?"

But the problem of disproportionate criminality among Negroes is not peculiar to Harlem or South Chicago or Philadelphia, nor is it an especially new problem. Between 1930 and 1959, when Negroes represented about 10 per cent of the population, Negroes made up 54 per cent of those executed for crimes. And in a typical year, substantially similar figures are reported across the nation. The FBI's *Uniform Crime Reports* for 1960 provide these figures on arrests for major crimes in 2446 cities having a population of 73,473,000:

Offense Charged	*Total*	*White*	*Negro*	*Per cent Negro*
Murder and nonnegligent homicide	4,120	1,536	2,511	60.9
Robbery	25,501	10,994	14,155	55.5
Aggravated assault	127,728	70,122	54,737	42.9
Burglary	102,536	66,130	33,536	34.7
Larceny-theft	199,063	129,158	65,063	32.7
Forcible rape	5,326	2,459	2,778	52.2
Prostitution and commercialized vice	23,031	11,046	11,594	50.3
Other sex offenses	40,702	27,813	11,901	29.2
Narcotic drug laws	16,370	8,506	7,570	46.2
Weapons; carrying, possessing, etc.	32,124	14,729	17,005	52.9

When it is kept in mind that the cities included in the FBI reports constitute a fair random sample, North and South, small towns and large, the sobering nature of these figures becomes apparent.

What can explain this dismaying tendency of the Negro toward disproportionate criminality? The same rationalizations (with a few ludicrous variations) are trotted out that are produced to discredit the figures on illegitimacy. Gunnar Myrdal devoted twelve pages of *An American Dilemma* to scoffs, sneers, apologies, explanations, highflown fabrications, and wildly speculative generalities, all intended to whitewash the Negro record.

First, says Myrdal, the statistics are no good. Figures on crime are generally inadequate, and statistics on Negro crime are even more so. Such data generally suffer from incomplete and inaccurate reporting, variations among States in definitions and classifications; and in the case of the Negro, the figures are distorted by special weaknesses owing to the caste situation and to certain characteristics of the Negro population. "It happens that Negroes are seldom in a position to commit . . . white collar crimes [such as tax evasion, conspiracy to violate antitrust laws, fraud and racketeering]; they commit the crimes which much more frequently result in apprehension and punishment." This is a chief source of error when attempting to compare statistics on Negro and white crime.

Myrdal then paints a picture of the South no Southerner would recognize. For a jaw-dropping example of the strange fabrications that have made Myrdal's work notorious, consider the following:

> In the South, inequality of justice seems to be the most important factor in making the statistics on Negro crime and white crime not comparable: . . . [I]n any crime which remotely affects a white man, Negroes are more likely to be arrested than are whites, more likely to be indicted after arrest, more likely to be convicted in court and punished. Negroes will be arrested on the slightest suspicion, or on no suspicion at all, merely to provide witnesses or to work during a labor shortage in violation of anti-peonage laws. The popular belief that all Negroes are inherently criminal

> operates to increase arrests, and the Negro's lack of political power prevents a white policemen from worrying about how many Negro arrests he makes. Some white criminals have made use of these prejudices to divert suspicion away from themselves onto Negroes: for example, there are many documented cases of white robbers blackening their faces when committing crimes. In the Southern court, a Negro will seldom be treated seriously, and his testimony against a white man will be ignored, if he is permitted to express it at all. When sentenced he is usually given a heavier punishment and probation or suspended sentence is seldom allowed him. . . .

Myrdal goes on to remark that when white lawyers, installment collectors, insurance agents, plantation owners, and others cheat the Negroes of the South, they are "never" regarded as criminals. But stealing by Negroes from whites is almost always punished as a crime.

These things occur in the North, Myrdal asserts, although in a much smaller degree. In the North, the trouble is that the Negro has brought certain cultural practices with him from the South. Also, the Negro is poor. He cannot bribe policemen to let him off; he has no influential connections; he does not know the important people who can help him out of trouble.

In brief, Myrdal says, the statistics "do not provide a fair index of Negro crime." And for a typical example of the fallacies that permeate the statistics, "the Negro rape rate, like other Negro crime rates, is fallaciously high: white women may try to extricate themselves from the consequences of sexual delinquency by blaming or framing Negro men; a white woman who has a Negro lover can get rid of him or avoid social ostracism following detection by accusing him of rape; neurotic white women may hysterically interpret an innocent action as an 'attack' by a Negro."

In addition to the statistical distortions that result (1) from basic discrimination against Negroes and (2) from the Negro's poverty and ignorance of the law, Myrdal finds a third "group of causes of Negro crime." This, he says, is "connected with the slavery tradition and the caste situation." Negroes in the South traditionally have been permitted to

pilfer small items from their employers; the practice has imbued them with a general disrespect for property rights. And their feeling that there is nothing wrong with petty stealing "is strengthened by the fact that Negroes know that their white employers are exploiting them."

Beyond all this, Myrdal says, as a cause of "Negro crime," is the Negro's hatred of whites. The revenge motive figures in Negro muggings and headings: "Because the white man regards him as apart from society, it is natural for a Negro to regard himself as apart. He does not participate in making the laws in the South, and he has little chance to enforce them. To the average lower class Negro, at least in the South, the police, the courts, and even the law are arbitrary and hostile to Negroes, and thus are to be avoided or fought against. The ever-present hostility to the law and law-enforcement agencies on the part of all Southern Negroes and many Northern Negroes does not often manifest itself in an outbreak against them because the risks are too great. But occasionally this hostility does express itself, and then there is crime."

Myrdal concludes by asserting: "We know that Negroes are not biologically more criminal than whites. We do not know definitely that Negroes are culturally more criminal, although we do know that they come up against law-enforcement agencies more often. We suspect that the 'true' crime rate—when extraneous influences are held constant—is higher among Negroes. This is true at least for such crimes as involve personal violence, petty robbery, and sexual delinquency—because of the caste system and the slavery tradition. . . ."

Myrdal wrote in 1944. The statistics he struggled so wildly to discredit have not changed significantly in the past eighteen years. In this period, the Negro's position in American society has improved phenomenally; his political power has significantly increased in most Southern cities and has become decisive in many Northern wards and congressional districts. In both North and South, Negroes sit on juries, appear as counsel, serve as police officers. Myrdal's specious and shabby rationalizations based upon "discrimination" simply will not hold up in any national view. And of some of his

fatuous explanations (that many white criminals blacken their faces to put blame on innocent Negroes, that white women are responsible for a fallaciously high Negro rape rate because they frame Negro men, that *all* Southern Negroes are seized of an *ever-present* hostility to law and law enforcement) the less said, the better. Yet Myrdal is so widely touted as the ablest authority on the American Negro that the Supreme Court of the United States, in the *Brown* case, suggested that his work be "seen generally" as a support for the court's reasoning!

Well, the palpable truth is that many white men also are poor; they too know frustrations, feel resentments, fear the real world they live in. But studies of arrests by place of residence, correlated against census data on housing, suggest no levels of criminality in poor and underprivileged white neighborhoods that compare with criminality in generally comparable Negro neighborhoods. Crime always may be measured by an index of poverty, and it is true that poverty exists far more widely among Negroes than among whites; but if poverty were the whole explanation, or even a key explanation, surely the remarkable increases in Negro per capita income over the past fifty years should be reflected in some corresponding decrease in rates of crime among the Negro people. *No such correspondence exists.* The Negroes of America are better off materially, culturally, and politically than any Negroid people in the world, and their lot improves at an incredible speed. Yet there are the facts on trends in illegitimacy; and there are the facts on trends in crime. And the insistent *why?* will not go away.

Nathaniel Weyl, who started his studies with an environmentalist's view, concludes his chapter on Negro criminality with a comment that the character patterns disclosed by the facts are "presumably genetic in origin." Dr. W. C. George, head of the Department of Anatomy at the University of North Carolina, also tends to find an explanation in racial factors: "Whatever other virtues Negroes may have, and they have many, all of the evidence that I know about—and there is a lot of it—indicates that the Caucasian race is superior to the Negro race in the creation and maintenance of what we call civilization."

A great many white Southerners accept this thesis implicitly and unquestioningly; they infer the innate "inferiority" of the typical Negro, in terms of Western cultural values, simply on the basis of their lifelong observation of the Negro people about them. No other explanation appeals to their common sense, or to their native prejudice, or to both. This is something they *know*, and they profess to know it not in anthropological terms (the weight of brains, the pigmentation of skins, the length of appendages, the formation of skull and jaw), but in terms of ordinary human observation.

I incline toward this view myself, but I certainly would not assert, as Myrdal asserts the contrary, that I "know" it to be true. I would be agreeable to accepting the temperate and tentative conclusion voiced by Professor G. M. Morant, of England, in a most unlikely place—an essay in UNESCO's *Race and Prejudice* (Columbia, 1961). The volume as a whole is almost worthless to the objective student; most of the essays are no more than special pleading by propagandists against racial prejudice. But Morant examines the evidence of intelligence tests and other data with a scientist's objectivity, and he concludes by saying this:

"There seems to be no reason why the general rule regarding variation within and between groups should not apply to mental as well as to physical characters. If variable characters of the former kind showed identical distributions for all racial populations, that would be a situation unparalleled, as far as is known, as regards any physical character in man or in any other animal. It seems to be impossible to evade the conclusion that some racial differences in mental characters must be expected. Existing evidence may not be extensive and cogent enough to reveal them, but it must be inferred that some exist. . . ."

Morant makes the point, in analyzing intelligence-test scores, that obviously white and Negro scores overlap. Consistently, the most superior Negroes will score higher as a group than the most inferior whites as a group. Moreover, the difference between the average scores of two racial populations may be quite small compared with the range of scores in either group. But even when this is so, says Morant,

"there may be a marked difference between the relative frequencies in the population of individuals having extreme values of the measurement." And this distinction may be important in the case of some mental characteristics: "There may be almost equal proportions of stupid, mediocre, and able people in two populations; even so, exceptional ability may be found with a frequency of 1 in 1,000 in one group, and of 1 in 10,000 in the other. Having a larger proportion of exceptionally able members may be a factor which tells decisively in favor of a population in the course of centuries or millenniums."

The Liberal social anthropologists, to be sure, have denounced this reasonable hypothesis out of hand; and by effectively dominating the professional field, they have managed to elevate their own opinions to the status of truth, to promote speculation to the level of fact, and to convert surmise deftly into incontrovertible proof. I believe they have overdone it. They have lost their own case by their own disgraceful intemperance and intolerance of dissent; they protest too much; they cover up; they propagandize; they set out not to seek truth, but "to combat racial prejudice."

At the same time, I would insert a comment that some of the more intemperate protagonists on the segregationist Right have fallen into the same errors of positivism and unqualified statement. They have tended to think too much in blanket terms—in literal blacks and whites—and they have regularly overestimated the factors of heredity and underestimated the factors of environment. Their position would be improved if they simply acknowledged that the question of the Negro's innate inferiority has not been proved and hence is still open.

In terms of the problem immediately at hand, the question of whether the Negro's shortcomings are "innate" seems to me largely irrelevant anyhow. The issue is not likely to be proved to the satisfaction of either side any time soon; it may not be susceptible of proof at all. Whether these characteristics are inherited or acquired, they *are*. And communities North and South (but especially in the South, and more especially still, in the rural South) must cope with conditions as they find them. The ruins of Zimbadwe are

a long way from Prince Edward County, Virginia, and the finest analysis of electroencephalic findings among the Zulus is of small importance in teaching a class of Alabama sixth-graders. The arguments of anthropology are of interest to the South, and I would not wish to leave any impression that would minimize their importance; the fear of ultimate racial interbreeding, encouraged by prospective generations of desegregated and integrated school systems, is a very real fear in the South and not an imagined one. If these Negro characteristics *are* innate, the white Southerner sees nothing but disaster to his race in risking an accelerated intermingling of blood lines. And even if these Negro characteristics are not innate, the white Southerner wants no intimate association with them anyhow. And he is determined not to let his children be guinea pigs for any man's social experiment.

VII

The second of the South's principal arguments, related to anthropological considerations but of more immediate application, may be termed the argument of practicality: Even if it be true, as the liberal social anthropologists insist, that there is no innate cultural or intellectual inferiority in the Negro race as such, the plain fact is that here and now, there are immense differences in the educational achievements and apparent aptitudes of the two races; and these differences, especially in small rural communities, make true integration of public schools an impossibility. Beyond this, the educational needs of white and Negro children in the South, in terms of the lives they will lead and the employment they predictably will find, are quite different; and these differences, especially in the small counties, create formidable problems of curriculum. Finally, the temper, and prejudices, and feelings of the white taxpayers, who overwhelmingly bear the bulk of public school costs, simply cannot be discounted altogether; political realities have to be considered, and grave thought must be given, as a practical matter, to the social upheaval that inevitably would accompany massive desegregation of public schools in those areas of the South where Negro populations are greatest and traditions of racial separation are most deeply ingrained.

As Otto Klineberg points out in *Characteristics of the American Negro,* efforts to test the intelligence or the educational aptitude of Negro children go back a long way. In 1897, G. R. Stetson gave memory tests to fourth-and fifth-graders in the District of Columbia; the Negro pupils, who averaged a year and a half older than the whites, proved superior in memorizing three out of four stanzas of poetry. Truly is it said that the first shall be last and the last shall be first, for Stetson's findings of 1897 represent one of the very few such inquiries in which Negroes have scored higher than whites. Since then, an exhaustive series of tests almost invariably have produced data pointing just the other way.

In 1913, A. C. Strong studied white and Negro school children of Columbia, S. C., and found the colored children mentally younger. The following year, B. A. Phillips reported on an analysis of twenty-nine white and twenty-nine Negro children who had been equated in terms of home environment, and found such a difference in mentality between the two groups that he wondered if they should be instructed under the same curriculum. In 1916, G. O. Ferguson tested white and Negro pupils of Richmond, Fredericksburg, and Newport News, Va., and found the superiority of the white group indubitable. In this same study he attempted further to classify the Negro subjects according to skin color (pure Negro, three-fourths Negro, mulatto, and quadroon), and found a plain correlation between higher scores and lighter skins.

Intelligence testing by racial groups was launched on a large scale with World War I. As an aid to military authorities, three separate tests were devised. The first, known as Army A, never was very widely used; it contained some four hundred items and featured two tests, of immediate memory and cancellation, which proved to be impracticable. Analyses of findings were made, however, by Ferguson and by Robert M. Yerkes, of 10,276 Negro soldiers and 38,628 white soldiers tested on Army A at Camp Lee and Camp Dix. The median score among Negro recruits ranged from 14.8 at Lee to 53 at Dix, the white recruits from 116 at Lee to 171 at Dix.

In an effort to devise a more useful test, a committee of five psychologists, led by Yerkes, was appointed by the American Psychological Association in April 1917. They put to-

gether tests that came to be known as Army Alpha and Army Beta. The tests, which brought together the most advanced psychological knowledge of their day, still are widely respected by psychologists forty-five years later. Henry E. Garrett, professor emeritus of psychology at Columbia University, has said of them that "owing to the size of the groups and the lack of special selection, the army test data yield probably the fairest and most unbiased comparison of Negro and white intelligence which we possess."

The Alpha test was divided into eight sections, testing the examinee's ability in following directions, arithmetic problems, practical judgment, synonyms and antonyms, disarranged sentences, completion of number series, analogies, and general information. The psychologists' committee realized, however, that because of its heavy reliance upon literacy and cultural factors, the Alpha test would tell Army examiners little about the intelligence and capacity of recruits whose schooling was limited and whose cultural background was poor. Hence the Beta test was devised, as a nonlanguage test on which all illiterates could compete equally.

The average score of the white soldier on the Alpha test was 59, that of the Northern Negro 39, and that of the Southern Negro 12. The better educational equipment of the whites presumably might account for some of this astonishing difference, without considering any questions of innate ability at all. But this superior equipment did not figure on the Beta test. And on Beta, the whites averaged 43, the Northern Negro 33, and the Southern Negro 20. Analyzing these Beta findings in one study of men tested at Camp Grant, M. R. Trabue concluded that the average Northern Negro recruit had an ability to learn new things about equivalent to that of the average eleven-year-old white boy, and the average Southern Negro recruit a mental capacity at the nine-year-old level.

Notably, the figures on Negro "overlapping" were not significantly different for the two tests. It was found that only 27 per cent of the Negroes exceeded the white average score on Alpha. On Beta, the figure was 29 per cent. As Dr. McGurk has pointed out, if the Negroes' comparatively poor scores were entirely a consequence of social and economic differences, a lessening of these differences should have produced,

in the Beta test, a corresponding increase in the Negro overlap. Put another way: "An improvement in cultural opportunities should result in an improvement in the capacity for education. If cultural opportunities are not important in determining capacity for education, improving the cultural opportunities will have no effect on capacity for education." And Dr. McGurk, it should be remembered, is a Villanova social scientist who has devoted a lifetime to research in this field.

The massive statistics of the World War I tests have served as grist for the mills of a hundred psychologists and social anthropologists. Those of the equalitarian school have done some curious things with the figures, in a strained effort to prove that significant differences in racial scores are related solely to environment and not at all to heredity. The student who inquires into the literature scarcely can pick up an equalitarian book that does not offer the following table:

SOUTHERN WHITES AND NORTHERN NEGROES, ARMY TESTS, 1918

Whites		*Negroes*	
State	*Median score*	*State*	*Median score*
Mississippi	41.25	Pennsylvania	42.00
Kentucky	41.50	New York	45.00
Arkansas	41.55	Illinois	47.35
Georgia	42.12	Ohio	49.50

Klineberg, who used this table in his 1944 work, says the comparison shows that Northern Negroes "are superior to the white groups from a number of Southern States."

Taken at face value, that is certainly one conclusion that might be drawn, at least as to four Southern States, but the figures merit a closer look. What Klineberg did, as Garrett has shown, was to take the four Southern States where the white medians were *lowest* and compare them with the four Northern States where the Negro medians were *highest.* Beyond demonstrating that Negroes in some Northern States scored higher than whites in some Southern States, this widely reproduced table tells us little.

Moreover, Klineberg—and Montagu, and Benedict, and others who are so fond of this data—do not present the figures from the four Northern States that might truly have significance in terms of local problems of public education. Garrett, whose computations of medians differ slightly from Klineberg's, puts the data together in this fashion:

State	*Number Tested*		*White Median*	*Negro Median*
	White	*Negro*		
Pennsylvania	3,089	498	64.6	41.5
New York	2,843	850	64.0	44.5
Illinois	2,056	578	63.0	46.9
Ohio	2,318	152	66.7	48.8

Garrett then makes the self-evident point that Negroes in these four States scored as far below white soldiers *from the same States* as they scored below whites in the country as a whole. The student who wants to dig more deeply into these World War I findings will find them fully reported in professional literature. Audrey Shuey's *The Testing of Negro Intelligence* summarizes the data and provides an extensive bibliography of work done on the figures.

It is curious that so much labor has been spent on the World War I figures, and relatively so little on the more up-to-date data from World War II and Korea. Yet from one point of view this is not so curious either: In the thirty-six years between 1917 and 1943, the American Negro experienced prodigious gains in educational, cultural, economic, and social opportunities. Surely, it might be thought, these gains would have been reflected in some significant improvement in his military test scores. No such improvement can be detected. Nathaniel Weyl has summed up the facts:

"A comparison of Army General Classification Test (AGCT) scores of white and Negro enlisted men in military service in March, 1945, shows that 6.3 per cent of the whites, but only 1.0 per cent of the Negroes, were in Group I (very superior) and that 39.7 per cent of the whites, but only 7.4 per cent of the Negroes, were in the first two (better than average) categories. On the other hand, only 26.9

per cent of the whites, as contrasted with 77.7 per cent of the Negroes (more than three-fourths of them), were in the two bottom (inferior and very inferior) groups."

In World War I, Weyl continues, the Negro overlap on the combined tests was 13.5 per cent—that is, 13½ Negroes in 100 scored as well as the average white man. By the time of World War II, the overlap had dropped to 12 per cent, and if the scores of mental rejects are included for both races, to only 10 per cent. Still more embarrassing to the equalitarians, their precious comparisons of World War I between Northern Negroes and Southern whites tend to dissolve in the findings of World War II. Weyl summarizes a comparison between Negroes examined in the First Command Area (New England), where Negroes had the highest median, with white recruits examined in the Fourth Command Area (Southern), where white medians were lowest. Some 34 per cent of the Southern whites made scores of superior or very superior; only 9 per cent of the Northern Negroes were in these brackets.

Finally, on the matter of AGCT scores, mention may be made of an unpublished master's thesis by B. E. Fulk of the University of Illinois; the paper is cited by Shuey in her encompassing survey of the field. Fulk obtained data on 2174 white and 2010 Negro enlisted men examined by the Army Air Force Service Command. He then correlated their AGCT scores in terms of the years of education they had experienced. It may well be true that the Negroes here tested had attended poorer schools than the whites; but to persons interested in understanding some of the real and practical problems of school desegregation, Fulk's tabulations will be rewarding (see page 78).

If the formidable gaps shown by those figures do not persuade the South's critics of the difficult problems implicit in welding together two country high schools, one white, the other Negro, perhaps no evidence would persuade them. Yet abundant other evidence is widely available.

Dr. Shuey has put the facts together in a book that cannot be overlooked by serious students of the desegregation problem. She is head of the Department of Psychology at Randolph-Macon Woman's College in Virginia. Her massive

Years of Education	*Median White*	*Median Negro*
0	82.45	59.35
1	91.20	58.40
2	88.45	57.75
3	91.20	57.60
4	90.65	59.80
5	90.35	54.65
6	87.95	59.60
7	85.40	64.45
8	94.50	69.25
9	100.70	73.35
10	102.50	78.95
11	107.95	85.95
12	109.20	93.05
Total	95.10	68.95

labors have had a stunning impact upon the more idealistic advocates of immediate integration. Here in cold statistical tables, unwarmed by subjective opinion, she has summarized more than forty years of investigation into Negro intelligence. These are not her findings; they are the findings of scholars who have done original or independent research. No matter how these findings may be explained away (and the NAACP has retained a committee of psychologists now seeking desperately to explain them away), the figures speak tellingly of the problems that educators must face in mixing the two races massively in the same classrooms.

The literature discloses that at the preschool level, there is a marked but not unmanageable difference between white and Negro aptitudes. A typical Stanford-Binet test of five-year-olds, for example, may turn up a median of 112 for white children, 95.8 for Negro children. The gap is dismayingly wide, but it can be coped with.

Thereafter, as the children move into upper grades, the tendency is for the gap to grow steadily greater. Dr. Shuey made an analysis of 101 tests given to Negro elementary-school children from one end of the country to the other.

Some of these tests were given by Negro psychologists, in an effort to improve the rapport between examiner and subject. In other investigations, careful efforts were made to equate the home backgrounds of white and Negro subjects. All told, the 101 investigations cover findings on 51,000 colored children, and provide 310 comparisons for relative standing of colored and white. "In 297 of the comparisons," Dr. Shuey notes, "the colored children scored the lower; in 144 they were lower than the white norms."

Dr. McGurk's analysis of the professional literature in this field closely parallels Dr. Shuey's report. Between 1935 and 1950, he has stated, sixty-three articles appeared in professional journals of psychology dealing with Negro-white test-score differences. *In all sixty-three of them,* the average test score of the Negro subjects was found to be lower than the average test score of the white subjects with whom they were compared. Six of these investigations are regarded by McGurk as especially significant:

1. A study of a group of Canadian Negroes and whites in 1939 by H. A. Tanser. The Negro children tested were the descendants of slaves who had escaped from the South prior to and during the Civil War. Their social and economic opportunities had been generally equal to those of whites in the area. Yet the findings of three standard psychological tests administered to children in grades 1–8 found the Negro averages far below the white averages at every age and every grade. For the total groups, only 13 to 20 per cent of the Negroes overlapped the white average, and in no case did the overlap exceed 20 per cent.

2. A study of white and Negro children in a poor section of rural Virginia, done by M. Bruce in 1940. In order to eliminate the factor of social and economic differences, the author first administered a test of socio-economic status, and then paired off her subjects so that each member of a pair, one Negro child and one white child, had the same socio-economic score. Negro overlapping on three separate tests ranged between 15 per cent and 20 per cent.

3. A study by Dr. Shuey of white and Negro college students in New York, in 1942. Again, the Negro and white students were first given socio-economic tests in order to pair

them off. The Negro overlap amounted to 18 per cent. Of this investigation, Dr. McGurk says: "Considering that this was a highly selected group of college students, such low overlapping is surprising. It does not lend credence to the belief that socio-economic factors are responsible for the Negro-white differences in psychological test performance."

4. A study of white and Negro kindergarten children in Minneapolis, 1944, done by F. Brown. The test scores found a 31 per cent overlapping. (At very early ages, overlap always is greater because tests deal more with performance and with sensory-motor responses, and less with verbal skills).

5. A study by T. F. Rhoads and associates of white and Negro children at the age of three. This was a very detailed study, in which each of the subjects was clinically examined from birth until the time he was administered a psychological test. Socio-economic factors were reported to be generally equal for the entire group of subjects. The overlapping amounted to 30 per cent.

6. A study by McGurk himself of Negro and white high school seniors in Pennsylvania and New Jersey. Again, Negroes and whites were matched for social and economic status by pairing a white subject with each Negro subject so that both members of a pair were identical or equivalent for fourteen different socio-economic factors. These students then took a test composed half of "cultural questions," and half of "non-cultural questions." McGurk's finding: "In spite of the equivalence of socio-economic factors, 29 per cent of the Negro subjects overlapped the average total score of the white subjects. This is almost identical with the overlapping reported in the Alpha and Beta tests of World War I. There is hardly any question about the socio-economic superiority of this 1951 group of Negroes when compared with the Negroes of World War I. Yet, relative to white subjects, the intervening improvements in social and economic opportunities of the Negroes had not improved their psychological test performance at all."

In 1953, Dr. McGurk published an additional study in the *Journal of Abnormal and Social Psychology*, "On White and Negro Test Performance and Socio-Economic Factors." Here he reclassified the subjects of his 1951 study, in order

to compare the 25 per cent of each race who might be regarded as a "high group" and as a "low group" in terms of socio-economic factors. Rearrangement of the data made no difference. It became apparent that socio-economic factors had not made the two groups equally proficient in psychological tests. "The average score of the high Negro group was very much lower than the average score of the whites of equivalent socio-economic status. In terms of Negro overlap, only 18 per cent of these Negro children of excellent socio-economic background obtained test scores that equalled or exceeded the average white score."

Assuming that the liberal social anthropologists are right in what they say, that social and economic forces are of paramount importance, McGurk comments, "There should have been no differences between Negroes and whites in any of these comparisons. As it actually turned out, the difference between Negroes and whites is much greater when both groups are of high socio-economic status than when the racial groups are of deprived socio-economic status."

Further analysis of McGurk's 1951 study in terms of the "cultural questions" and the "noncultural" questions totally disproved the notion that cultural questions on these intelligence tests unduly hold back the Negro in his performance. Taking the cultural questions alone, it was found that 24 per cent of the high Negro group overlapped the average scores of the high white group. On the noncultural questions, where it might have been expected that the Negroes would do better, they did worse: Barely one out of five of the high Negro group overlapped the high white group. Comparing the two low groups, McGurk found that the low Negro group actually had an insignificantly higher average score than the low white group on the cultural questions, with an overlap of about 55 per cent. On the noncultural questions, the average of the low white group was significantly greater than that of the low Negro group. There was an overlap of about 29 per cent.

McGurk has summed up his conclusions in this fashion:

> Regardless of our emotional attachment to the school desegregation problem, certain facts must be faced. First,

as far as psychological test performance is a measure of capacity for education, Negroes as a group do not possess as much of it as whites as a group. This has been demonstrated over and over.

Next, we must realize that, since 1918, the vast improvements in the social and economic status of the Negro have not changed his relationship to the whites regarding capacity for education. This is not to say that this relationship cannot be changed; it says merely that it has not been changed. . . .

Thirdly, as far as our knowledge of the problem goes, the improvements in the social and economic opportunities have only increased the differences between Negroes and whites. This is because such improvements have been given to both racial groups—not only to the Negro—and the whites have profited the more from them. This serves to emphasize the former statement that a fruitful approach to racial equality cannot follow the lines of social and economic manipulation. There is something more important, more basic, to the race problem than differences in external opportunity.

Dr. McGurk's conclusions, it should be said in fairness (even in this partisan brief), have been widely denounced by his equalitarian colleagues. Following publication of his 1956 statement in *U. S. News & World Report*, eighteen social scientists united in a rebuttal assertion that "given similar degrees of cultural opportunity to realize their potentialities, the average achievement of the members of each ethnic group is about the same." And in the Spring 1958, issue of *Harvard Educational Review*, William M. McCord, an assistant professor of sociology at Stanford University, and Nicholas J. Demerath, III, of Harvard, a senior student, returned to the attack on McGurk.

In my own view, the rejoinders of McCord and Demerath are remarkably feeble. The investigations they cite, in an effort to refute McGurk's conclusions, provide no refutation at all. Their own study of "predelinquent" and normal boys in Cambridge-Somerville, Mass., is so affected by subjective evaluations that it contributes little to an objective

appraisal of conditions that confront school administrators elsewhere. (They attempted to establish a correlation between the boys' intelligence and their social class, parental education, "home atmosphere," and "personality of the boys' fathers"; other factors dealt with the subjects' homes—cohesive, quarrelsome, quarrelsome-neglecting, or broken—and whether the boys' fathers were loving, passive, cruel, neglecting, or absent.) In any event, most of their elaborately tabulated findings tend merely to support McGurk's own conclusion that at the lowest social levels, white and Negro test scores are not significantly different.

The evidence put together by Shuey and McGurk is solid, dispassionate, unbiased, overwhelming; it cannot be disregarded—not, that is, if one wishes to gain any real understanding of the problems that confront local school boards over much of the South. To pull the general figures down to a single, specific case study, consider the findings of some tests administered in Dallas in 1954–55. There more than 1600 Negro pupils and almost 5700 white pupils were tested in the first grade on their general readiness for learning—on their ability to pay attention, follow directions, handle crayons and pencils, understand and use language, and so on. These were the findings:

Number of Negro Children	*Per cent Negro Children*	*Category*	*Number of White Children*	*Per cent White Children*
15	.92	Superior	576	10.14
105	6.47	High Normal	1,503	26.50
299	18.43	Average	1,814	31.96
677	41.71	Low Normal	1,391	24.50
527	32.47	Poor Risk	392	6.90

In sum, 37 per cent of the white first-graders scored in the "high normal" and "superior" groups, against only 7 per cent of the Negro first-graders. At the other end of the scale, 31 per cent of the white pupils scored in the "low normal" and "poor risk" groups, against 74 per cent of the Negro pupils.

For another specific example, consider the findings in Virginia among pupils of an older age group. Over a period of five successive years, between 1949–50 and 1953–54, the State Department of Education administered the Iowa Silent Reading Test to all eighth-graders in the Virginia public school system. This is a standardized achievement test in reading, employed by school systems throughout the country to discover certain facts of immediate, practical importance to classroom teachers: How well do the children read? How well do they understand? The tests in Virginia were given in May of each year, when all of the children had a grade placement of 8.8 (eighth year, eighth month). Scores on the Iowa test are calibrated to match the grade placement, so that a pupil who scores a reading-grade equivalent of 8.7 would be one month retarded in achievement, and a pupil who scores a reading-grade equivalent of 8.9 would be one month advanced in achievement.

This is what the Virginia tests found in May 1954, the month of the *Brown* decision (findings were not significantly different in the four preceding years): The median white child in the county schools was about half a year behind the achievement level he should have reached; he was reading at a level of 8.3 (eighth grade, third month). But the median Negro child in the county schools was reading at a level of 6.2 (sixth grade, second month). The top one-fourth of the white children (75th percentile) were reading at a level of the tenth grade, third month, or better; but the top one-fourth of the Negro children were not even at the 8.8 level —the 75th percentile among the Negro pupils was found at 7.5.

Scores on the Virginia tests were higher in the city schools, but among the Negro pupils, not much higher. In the cities, the median white eighth-grader was found to be reading at a level of the ninth grade, second month; the median Negro eighth-grader scored 6.5. In less statistical language, this means simply that in terms of reading skills, which are the foundation of all other academic skills, Virginia's white eighth-graders as a group were found in 1954 to be from two years to nearly three full years ahead of the Negro eighth-graders as a group. Subsequent tests, administered on

a more limited scale since 1954, have shown no material change.

Now, how is one to organize a viable public school—a completely desegregated school—under such conditions as these? If one is the superintendent of schools in the District of Columbia, one can cope with what Dr. Carl F. Hansen has described as "the enormous educational problem of upgrading large numbers of educationally handicapped children" by a variety of devices: Squads of psychiatrists, platoons of remedial-reading instructors, a "four-track" system, and the like. And if one spends enough money, and has enough pupils and buildings to permit some shuffling around among schools, and pays salaries high enough to keep some of the most competent teachers in the country, one can accomplish a good deal. But how many rural counties in the South, where the *total* school population may number only 2000 or 2500, can possibly apply the drastic remedies found necessary in Washington?

Consider the schools of Washington, D. C. The capital is the showcase of the nation in terms of desegregation. If genuinely "mixed" schools are to work anywhere, they should work best in the District of Columbia, where every factor combines to produce the most favorable opportunity: The political climate of a Federal administration anxious to achieve integration, the immense resources of a lavish school budget, the cultural amenities freely available to all children as an adjunct to learning, the absence of racial discrimination in employment, the untypically high incomes and job status of many Negro families. It is entirely reasonable to assume that pupils in the Washington schools, as a group, should not be merely average, or slightly above average; they should in fact lead the entire country. Moreover, it seems a fair assumption that the exodus of white families from the District has tended to leave behind those white children who in general are less able mentally and more nearly on the Negro's cultural level. If Negro pupils are to show up well anywhere, they should show up well here. The facts indicate nothing of the kind.

The District of Columbia desegregated its schools in September 1954, following the Supreme Court's opinion the

preceding May. In October 1955, after a year of experience with desegregation, the Stanford Advanced Reading and Arithmetic Tests were given to some 4600 eighth-grade pupils in the Washington public schools—1600 white pupils and 3000 Negro pupils. The findings in Washington almost exactly paralleled the findings in Virginia: Two-thirds of the Negro children were found to be reading at the sixth-grade level *or below* (21 per cent of the Negro eighth-graders, indeed, were reading at the fifth-grade level, and 22 per cent were reading at the fourth-grade level). Only 12 per cent of the white eighth-graders were at the sixth-grade level or below, and 54 per cent of the white pupils were at the tenth-grade level or above.

Shocked officials of the District of Columbia plunged headlong into remedial programs. Their herculean labors have been reported widely and sympathetically. At once, the four-track system was devised, and pupils systematically were assigned to (1) an honors program, (2) a general college-preparatory program, (3) a program for pupils not planning to go to college, and (4) a remedial basic curriculum for slow-learning pupils. One effect was to achieve a very substantial resegregation, for the great bulk of those on tracks 1 and 2 turned out to be white pupils, and the great bulk of those on tracks 3 and 4 turned out to be Negro pupils. The resegregation process was helped along materially by Washington's younger white families, who fled the District by the thousands. In 1950, Washington's schools were almost evenly balanced, 50–50, in white and colored enrollment; ten years later, white pupils constituted 20 per cent, Negro pupils 80 per cent, of the enrollment. Remedial classes for slow learners, in which teaching specialists work with groups averaging no more than eighteen per class, have been swiftly stepped up; there were seventy-four such classes in 1954; the number grew to 225 in the 1959–60 session. The reading-clinic staff increased from twelve to thirty-two in that period of time, and a special Division of Pupil Appraisal more than doubled with the addition of a dozen school psychologists, clinical psychologists, and psychiatric social workers. New batteries of achievement tests were administered every year.

At the close of the school year in 1959, five full years after racial discrimination had been obliterated from the Washington schools, Dr. Hansen released some figures on how things were going. To the integrationist Washington *Post,* reporting happily on the data, things were going marvelously well: "District pupils' performance on standardized tests this year topped last year's scores in 15 of the 27 subjects tested, School Superintendent Carl F. Hansen reported yesterday." The cheery tone of the *Post*'s story was somewhat belied by the glum figures themselves. Washington's sixth-graders had managed to achieve median scores in spelling, language, and arithmetical computation exactly matching—no more—the national norms for these three sixth-grade tests. Medians on the other twenty-four tests were below national norms, in some instances by as much as a full year. Ninth-graders who should have scored a median of 9.4 (ninth year, fourth month) in computation and paragraph meaning scored 8.3 and 8.4 respectively. Dr. Hansen's report on tests at the third-grade and fifth-grade levels has special interest:

		National	*District Median Scores*			
Grade	*Subject*	*Norm*	*55-56*	*56-57*	*57-58*	*58-59*
3	Paragraph meaning	3.5	2.3	2.5	2.9	3.1
3	Word meaning	3.5	2.5	2.6	3.1	3.1
3	Spelling	3.5	2.5	3.0	3.1	3.2
3	Arith. reasoning	3.5	2.4	2.8	2.8	3.2
3	Arith. computation	3.5	2.6	2.7	2.9	3.2
5	Paragraph meaning	5.1	3.8	4.1	4.3	4.2
5	Word meaning	5.1	4.1	4.5	4.6	4.4
5	Language	5.1	4.2	4.5	4.6	4.4
5	Spelling	5.1	4.2	4.3	4.8	4.5
5	Arith. reasoning	5.1	4.2	4.5	4.6	4.5
5	Arith. computation	5.1	3.9	4.1	4.6	4.1

It should not escape notice that the Washington children whose median scores are shown in the foregoing table never had known a day of legally segregated schooling. The Negro pupils here tested never had suffered the school discrimina-

tion likely to affect their hearts and minds in a fashion never to be undone. These pupils, on the contrary, had had the benefit of all the special attention that could be given them by a school administration frantically eager to demonstrate the glories of integration. No resource of guidance and special teaching, no visual aid or teaching technique had been denied them. Yet there are the scores: Not a single test in Washington's third and fifth grades produced a median equal to the national norm. The fifth-graders, backsliding, did not even equal fifth-grade scores the preceding year.

It is perhaps needless to dwell further upon the findings of intelligence and achievement tests beyond commenting briefly upon some of the flimsy efforts the equalitarians make to discredit them. One objection is that the Negro child has no "motivation" to do well on them; but at the younger age levels especially, this is pure conjecture. It also is complained that frequently the tests are administered to Negro children by white examiners, and that an essential rapport thereby is denied them; but this was not true of the tests in Washington, and it has not been true of many other investigations. The most frequent objection is that tests tend to compare white and colored children of unequal social and economic background; but abundant evidence is available of investigations in which subjects have been "paired" by every imaginable criterion, and almost without exception these tests show the same lamentable contrasts in white and Negro scores.

Otto Klineberg has attempted to dismiss all the findings: "Until and unless the *same* education is given to both races, comparisons will be unfair." But it manifestly is impossible to give the *same* education to any two groups. All that one can do is to provide the same textbooks, the same teaching aids, teachers with the same degree of education, and physical facilities generally comparable—but even then, identity of total educational opportunity could not possibly be achieved. The various tests now being administered in school systems across the country are as fair and objective as competent psychologists and educators can make them; and the bleak, undeniable fact, confirmed repeatedly in school districts both North and South, is that colored children regu-

larly score at lower levels than the white children of their communities. Thoughtful students of the difficult problem before the South will comprehend what the evidence means in terms of the real and practical obstacles to welding together white and Negro schools in rural areas below the Potomac.

Other very real difficulties merit reflection also. The disputations of social scientists cannot be considered in a vacuum, nor the findings of achievement tests treated as so many punched cards for an IBM machine. These are *children* we are concerned with, white and Negro alike, and the fact is (I do not argue the goodness or badness of the fact; I merely cite its existence) that white and Negro children in the South have many quite different educational requirements. The essentially dual and separate society of the South cannot be dissolved overnight by court decree. For years to come in the South, the practice of law and medicine, the handling of banking and finance, the sale of stocks and bonds, the management of large retail and wholesale enterprises, and the administration of commerce and government will continue to be overwhelmingly restricted to white persons. This is not to say that many able Negroes are not engaged in these fields now; they are, and their number is increasing, but they are conspicuous exceptions. In rural areas especially, where professional and business opportunities naturally are severely limited, the realities of adult opportunity are even more striking.

All this has to be considered practically in terms of curriculum planning, guidance, teaching emphasis, and the like. Nothing very significant is accomplished, really, in offering physics or calculus to rural Negro boys who intend to drop out at the ninth-grade level and go to work farming or cutting pulpwood. Negro girls who realistically expect to find employment in a tobacco stemmery, a laundry, a bakery, or in domestic service have educational requirements materially different from those of their white counterparts. The impatient theoretician, unwilling even to attempt to understand a social order he so thoroughly disapproves, doubtless will be repelled by this line of reasoning. But the reasoning has a way of making sense in rural county seats.

A point is made of the exceptional Negro students. What of them? Why should a brilliant and ambitious colored youngster be held back by the relative ineptitude of his typical colored classmates? My answer is that he should not be held back, and I believe that in the course of time, this will be the answer of the South as a whole. When colored students appear who demonstrate the intellectual ability to compete at top levels with their white counterparts, I am wholly agreeable to any plan that would bring them, by transfer, to the finest high schools for miles around. Virginia has just such a program slowly formulating in its plan of "Freedom of Choice." But I would suggest that one consequence of such transfers of exceptional children, in the foreseeable future, would be to deny the slower Negro pupils the example and stimulation of superior students of their own race. The tendency would be further to reduce the achievement levels of the colored schools as such. But I would leave such decisions to the pupils and their parents themselves.

I have attempted to set forth two practical objections to school desegregation in the South, and especially in the rural South—first, the demonstrably lower levels of aptitude and achievement on the Negro's part, and second, the demonstrably different opportunities and occupations for which most colored pupils realistically must prepare themselves. A third difficulty involves the teaching staffs. The massive desegregation of Southern schools predictably would have a catastrophic effect upon the thousands of Negro men and women who now enjoy, within their race, relatively high status and relatively good incomes as public school teachers. In many areas of the South, as I have said, attitudes are changing and softening, as white parents discover there is a level of token desegregation that is not intolerable to them. This tendency, I feel certain, will increase year by year. But I cannot yet foresee the day, in the greatest part of the South, when white parents by and large will accept Negro teachers and Negro principals over their children. This would demand one more subtle and unwelcome shifting of gears; it would carry the social revolution beyond the point of an uneasy "equality" of pupils in a classroom, and would

make the white child subject to Negro masters. The efforts of a Federal court to compel employment of Negro teachers who would preside over heavily "mixed" classrooms would be bitterly resented, and the resentment would manifest itself in wholesale withdrawals and school abandonments. I venture the flat prediction, on the basis of personal conversations with white families who have moved out of Washington, that this difficulty would be seen as a last-straw condition. But the alternative to the employment of Negro teachers in massively desegregated schools is to discharge the Negro teachers and to replace them with white teachers. This would be cruelly unfair; but in any unhappy election between preserving the jobs of some Negro schoolteachers and preserving a local school system itself (which involves preservation of the good will of white parents and taxpayers), the jobs will go.

This line of discussion brings us to a fourth practical difficulty that would accompany massive desegregation in the South: the predictable difficulty in employing *white* teachers for racially mixed classrooms. New York, Philadelphia, and Washington have run into this constantly. Dr. Hansen has disclosed in the *Teachers' College Record* (October 1960) that Washington's school system employed 579 temporary teachers in 1954–55. By 1959–60, this number had grown to 1250. "It is difficult," he concedes, "to find white teachers psychologically prepared to take jobs in predominantly Negro schools, with the result that the source of applicants tends to become more and more restricted." And if Washington has this problem, with the high salaries and fringe benefits and physical facilities and cultural amenities it can offer a prospective teacher, what may we reasonably expect at the branch-heads?

One of the problems in this area, acknowledged even by Otto Klineberg, is the language barrier that so often baffles a white teacher in attempting to communicate effectively with a Negro child. "Obviously the Southern Negro speaks English," says Klineberg in *Characteristics of the American Negro*, "but equally obviously, his English is not similar to, or the equal of, the English spoken by the average white." Many other observers have made the same point. The Negro

inflection, pronunciation, word-choice, and accent are quite different; and in the case of the South Carolina gullah, these characteristics make speech almost incomprehensible. White teachers, with jobs widely available to them, simply would rather not get involved in this.

These teachers have other objections, too. As the record of hearings before a House subcommittee in 1956 makes vividly clear, many white teachers are simply appalled by the sexual mores and the violent attitudes of some of the Negro pupils in desegregated schools. One witness after another appeared before the committee to testify to the inordinate amount of time that had to be spent simply in maintaining discipline. Adolescent sex urges, volatile enough under any circumstances, are further complicated by the novelties and tensions of intimate interracial association in halls and classrooms and toilets. Philadelphians still recall grimly the incident at Shaw Junior High School in 1956, when a Negro gang gathered outside the school to insult and annoy pupils as they left the building. Three teachers who came out to remonstrate were attacked and severely beaten. The white principal of another Philadelphia school, who had watched the deterioration of his school from an "honors" institution of high scholarship into a second-rate vocational factory, was quoted in *U. S. News* in 1958: "Many of these youngsters are not adequately motivated for learning. They have no home to speak of, nothing to encourage them once they leave the school grounds. They're here simply to occupy their time until they're old enough to go out and get a job—if they can find a job."

These are among the arguments of practicality the Southerner would advance against compulsory desegregation of his public schools. He is not prepared to chop logic, or to engage in casuistic debate on the why of the world that he lives in. He knows that with the best will in the world—and in his fashion, he more often than not has great good will for the Negroes of his community—he cannot quickly elevate the Negro's home environment appreciably. Overnight he cannot put books and magazines in Negro living rooms; he cannot inject generations of cultural background with some magic hypodermic needle; he cannot deliver to the

Negro, as he would loan him a hoe or give him an overcoat, the social graces, the community of experience, the heritage of generations, the accumulation of business, professional, and civic understanding that necessarily must figure in the educative process. Time presses, and the school bell rings, and on April mornings the honk of the school bus, like the voice of the turtle, is abroad in the land. He has to do what he conceives to be best for his child *now*, to prepare that child for the society he predictably will live in tomorrow. And he does not accept the idea that racially mixed classrooms, over a long period of years, in the context of the only society he knows, will provide a workable, desirable, or pleasant experience for sons and daughters who are dear to him. Maybe, he says doubtfully, maybe some time in the future. . . .

IX

If there ever is to be in the South any significant degree of desegregation in public institutions, let alone any significant degree of integration in society as a whole, it can come effectively in one way only: slowly, cautiously, voluntarily, "some time in the future." This is the doctrine of "gradualism," and the Negro's professional leaders despise it. They insist, with some plausibility, that constitutional rights are personal and immediate rights, capable of being lost irretrievably if they are not exercised at once; and now that new constitutional rights have been created and defined, they ask, why is the realization of these rights coming so slowly? "How long do you expect us to wait?" they demand. "It is almost a hundred years since slavery now." They do not want to be gradual; they want to be integrated.

To these impatient appeals, the South makes a number of responses, none of them pleasing to the militant Negro leadership. But the responses make sense nonetheless. The answers add up to this: The Negro is plunging forward now in a movement that is at once both revolutionary and evolutionary. All of man's history suggests that while revolutionary changes may be hurried and pushed along by processes of forced growth, the changes that result from evolu-

tion can never be hurried at all. They will come at their own speed, and their own speed is glacial.

In many areas, the revolution proceeds apace. William G. Carleton, of the University of Florida at Gainesville, acknowledges "great strides" by the Southern Negro since World War II. In 1944, Negroes were virtually barred from participation in Southern politics. In 1960, when he reported in the *Teachers' College Record* that Negro rights were making haste slowly, 1,100,000 Negroes were registered to vote in Southern primaries and general elections. The number is considerably higher in 1962, and the United States Civil Rights Commission has conceded that except in a relatively few Black Belt localities in Louisiana, Alabama, Mississippi, and Georgia, Negroes now are not prevented from registering or voting over most of the South. In most areas, it is no longer the intimidation of the white man, but far more often the indolence, indifference, and incapacity of the Negro himself that keeps him from the polls. In some Southern States, Negro registration has climbed to 35 or 40 per cent of the adult Negro population; white registration, in many communities, is seldom much more than half or two-thirds of the adult population. In Florida, Negro registration increased from 8000 in 1944 to 160,000 in 1960. North Carolina and Virginia have witnessed gains almost as notable. To Carleton, a "veritable revolution" is seen in the South: "Had the mass of Southerners in 1950 been told that by 1960 there would be considerable token desegregation in the schools of Virginia, Tennessee, North Carolina, Arkansas, and Texas; even more desegregation on city bus lines; and that segregation at lunch counters and eating places would be here and there giving way in the South, they would have refused flatly to believe it. From the point of view of social justice, the changes have been painfully slow and spotty; but from the point of view of white Southern cultural attitudes, the changes have been unbelievably swift."

Note that the unbelievable changes of which Carleton speaks are changes from "segregation" to "desegregation," in his own careful choice of nouns, and not changes from "segregation" to "integration." It takes no great powers of

prophecy to envision a great many other such changes, as the South cautiously explores the possibilities of retaining its segregation while abandoning it too. I write in a period of transition. Ten years hence, in 1972, the perfect clarity of hindsight will perceive much that is now obscure; but my impression is that some sort of peak has been reached by the white South with the crisis over the parks of Birmingham. In the winter of 1961–62, a decision was reached by officials to close the Birmingham parks rather than to accept a policy of permitting their joint use by the two races, but the decision brought the first audible rumblings of misgiving and disagreement in a city that previously had been united in opposition to the slightest retreat from policies of total municipal segregation. A great many persons in Birmingham, sincerely convinced of the wisdom of essential racial separation, also were sincerely convinced of the desirability of retaining the parks on a functioning basis. They were aware that other Southern cities of comparable urbanity and custom had adjusted to a system of open parks. They did not like the idea of a parkless city; and they began actively to think about all this.

To the devout believers in racial integration, it doubtless appears incredible that Birmingham's action could have been taken in the first place, or that the wrongness of this decision (in their eyes) should fail to be instantly apparent. These impatient critics simply do not comprehend the depth of Southern feelings; they are as totally unable to accept the viewpoint of the typical white Southerner as the typical white Southerner is totally unable to accept the viewpoint of the Negro. In the course of time, each of these conflicting viewpoints will be seen more clearly; and once seen, may be understood and dealt with. But the process demands time, time, and more time. The death of racial segregation, which the integrationists see as a necessary end, will follow Caesar's prescription: It will come when it will come.

To any objective observer, it should be manifest that such a time is not yet—not in the early 1960s. In one city after another, North as well as South, the plain and palpable fact is that where "integration" is pushed too rapidly—more rapidly, that is, than the Negro community is prepared to

sustain it or the white community is prepared to accept it —a reverse action has set in. The District of Columbia offers a textbook example: Its public schools passed in eight years from segregation to desegregation to a virtual resegregation, as white families fled from mixed neighborhoods and mixed schools. St. Louis has acknowledged the same experience: William A. Kottmeyer, deputy superintendent of instruction in St. Louis, told the National Conference of Editorial Writers in October 1961 that St. Louis then had more actual segregation in its schools than had existed prior to the *Brown* decision. Of 130 elementary schools in St. Louis at the time, only 36 were classified as mixed; 46 were all white, and 48 all Negro. Nowhere in the South has school desegregation been attempted under more favorable auspices than in Louisville, yet in 1961–62 the trend back toward resegregation was appearing there, too. Between 1950 and 1960, Baltimore experienced a net out-migration of 175,000 white persons, and a net in-migration of 41,000 nonwhite persons. Dr. Houston R. Jackson, a Negro assistant superintendent of Baltimore schools, said in the summer of 1961 that Baltimore had more all-Negro schools at that time than it had before desegregation began in the fall of 1954: "When the Negroes in a school reach 50 per cent," he added, "that's when the white teachers begin to ask for transfers." And to judge from accounts of school litigation in such Northern localities as New Rochelle, N. Y., and Englewood, N. J., the antipathy of white persons to intimate and personal relationships with Negro persons is not a wholly Southern phenomenon. One satirical lexicographer, observing conditions in Chicago, has defined integration as "the period which elapses between the arrival of the first Negro and the departure of the last white." Manifestly, the resistance to a "coerced" racial "equality" is wide and deep.

Why is this so? The answer, in blunt speech, is that the Negro race, as a race, has not earned equality. And as I have attempted to argue earlier, it is a feeble and evasive response to accuse the white critic, in making that flat statement, of emulating the child who shot his parents and then pleaded for mercy as an orphan. The failure of the Negro race, as a race, to achieve equality cannot be blamed wholly

on white oppression. This is the excuse, the crutch, the piteous and finally pathetic defense of Negrophiles unable or unwilling to face reality. In other times and other places, sturdy, creative, and self-reliant minorities have carved out their own destiny; they have *compelled* acceptance on their own merit; they have demonstrated those qualities of leadership and resourcefulness and disciplined ambition that in the end cannot ever be denied. But the Negro race, as a race, has done none of this. "We do not *want* to be second-class citizens," cries James Farmer, national director of the Congress for Racial Equality. But "wanting" is not enough. It is a beginning; but it is no more than a beginning.

How is the Negro race, as a race, to earn the respect of the white race as a race? I should imagine that a cultivation of self-respect would offer an excellent starting place; and I do not see much of this now. With a few notable exceptions, most Negro spokesmen appear to spend their time condoning and minimizing the characteristics that deprive their race of a "first-class" reputation. Are Negro neighborhoods filthy? The Negro, it is said, has no incentive to clean them up. Why does this appalling rate of illegitimacy persist? The Negro, it is said, must relieve the frustrations brought on by segregation. Are Negro incomes generally low? It is all the fault of the white man: He deprives the Negro of job opportunities.

After so long a time, these repeated alibis grow stale. I have an idea that some Negro defenders themselves have ceased to believe in them. And I cherish the further idea that a really massive, significant change in race relations will not come until the Negro people develop leaders who will ask themselves the familiar question, "Why are we treated as second-class citizens?" and return a candid answer to it: "Because all too often that is what we are."

If the Negro people have the innate capacity that Montagu, Clark, Comas, Boas and the others insist they have, the Negro people in time will overcome every obstacle that fate has put in their way. On their own initiative, as a product of their own industry and skill, they will develop the talents that command respect in the market place. They will provide their own capital, build their own enterprises,

sell their own wares, compete among themselves until they have learned to compete in the whole wide world. They will exert, within their own community, the moral leadership necessary to reduce crime and illegitimacy. By participation first in their own constructive public affairs they will prove themselves capable of contributing actively to the civic, social, and economic life of their counties, towns, and cities. They will stop trying simply to imitate the white man; they will discover themselves first, and if this inner self is all that the liberal anthropologists assert it to be, the discovery should lead to wondrous exploitation. *Ebony* magazine made this same point editorially in 1959, when it urged its readers to stop complaining about being referred to as "Negro" or as "colored": "The real problem is the man called Negro. If he would spend as much time dignifying his race as he does decrying its designation, if he would quit worrying about the label and concentrate upon improving the product, the stuff inside, the name would take care of itself."

This was sound advice, and one of the hopeful aspects of the South in the early 1960s (there are not many) is that a new generation of young Negroes may even act upon it. Carleton remarks in his essay upon the increasing nationalization of the Southern Negro, who now, more often than not, has some Northern connections; and he says this:

"Not only has the Southern Negro been nationalized, he has also developed his own propertied and business classes, his own wealthy and middle classes. Every Southern city of any size has a group of economically comfortable and relatively independent lawyers, doctors, teachers, morticians, contractors, insurance agents, and owners of small businesses —garages and filling stations, restaurants, taverns, barber shops, beauty parlors, stores, and so forth. These people have education or considerable economic independence, or both."

In my own observation, this is quite true; the notable fact, as yet unrecognized by many staunch Southern segregationists, is that a new Negro is in fact emerging—the bright young high school senior, the serious college student, the impatient middle-class Negro couple, struggling for respect-

ability and status. Their impact is yet to be wholly felt within their own race, but it is being felt increasingly upon white institutions; and as a consequence, as Carleton observes, racial attitudes among white persons in certain parts of the South *are* subtly changing. He terms this a "softening." It is sometimes a hardening, too, as white families, having long cherished an affection for "their" Negroes, discover that their charges prefer not to be known as Uncle Toms or Aunt Jemimas; the disillusioned reaction, out of chagrin and embarrassment, is to let them bail themselves out of trouble, if that's the way they want it. The relationship changes. But if the Southern Negro is to find salvation at all, he must find it in this trend to independence and maturity. "The most important immediate force at work to emancipate the Negro of the South," says Carleton, "is the Southern Negro himself. A great change has come over him. He is no longer an Uncle Tom, or even the kind of Negro approved of by Booker T. Washington. He now talks back. He has a new self-respect, a new confidence, a new independence. Increasingly he is depending less on Northern Negro initiative and leadership and is supplying his own." To the extent that this prophecy is fulfilled—for all the bitter incidents, severances, and failures that may be expected—the upward and forward motion of the Negro will be recorded.

"The fault is not in our stars, but in ourselves, that we are underlings." The brooding, introspective advice of Cassius ought not to be spurned; it ought rather to be put to thoughtful use by those genuinely (as distinguished from merely politically) concerned with the Negroes' movement out of an underling's status. James B. Conant has recognized this, however belatedly, in his *Slums and Suburbs.* Here Dr. Conant paints a grimly realistic picture of a Negro child's life in the urban slums of the North, where the child may live six flights up in a tenement offering "one filthy room with a bed, a light bulb, and a stink." It is after visiting such tenements, and inspecting the schools attended by slum children, that he grows impatient "with both critics and defenders of public education who ignore the realities of school situations to engage in fruitless debate about educa-

tional philosophy, purposes, and the like: These situations call for action, not for hair-splitting arguments."

Dr. Conant is a distinguished spokesman for liberalism, but unlike most of his fastidious brethren, he came to the slums, and smelled them, and began to see realities fair and clear. What he has to say about Negro education merits a sober hearing. He is convinced that it is wrong to insist upon a curriculum completely unsuited to the needs of the children required to take it: "Foreign languages in Grade 7 or algebra in Grade 8 . . . have little place in a school in which half the pupils in that grade read at the fourth grade level or below. Homework has little relevance in a situation where home is a filthy, noisy tenement." By the same token, it may be suggested that in the rural South, school offerings ought to be adapted to real life also; and though Dr. Conant is a staunch opponent of school segregation as such—that is, to the assignment of pupils to schools solely by reason of their race—he sees no reason why satisfactory education cannot be provided in all-Negro schools. Arbitrarily to shift children around, simply to satisfy sociological theories of an ideal race-mixture, impressed Dr. Conant as wrong. This approach treats children "as though they were pawns on a chessboard."

But these children, white and black, are not mere pawns on a chessboard, and whatever the sins or submissions of their great-grandfathers may have been, they merit consideration in their own right. In the South, this consideration steadily is being extended. If we of the South cannot turn the clock back to 1868, when the Fourteenth Amendment was ratified, at least we can strive to turn the clock back to 1896, when the doctrine of separate but equal school facilities received a sort of casual endorsement from a Supreme Court concerned primarily with a question of public transportation. True, the apostles of the Brave New World will denounce the idea of applying the constitutional principles of 1896 to problems of the early 1960s, but there have been entirely too many such denunciations from thoughtless and ill-informed pedagogues. The Negro (precisely as the white) is entitled, so far as a system of education is concerned, to the same educational opportunities afforded

his white counterpart, and neither more nor less. What he does with these educational opportunities thereafter is his question to answer.

I do not profess to know what the future holds for the Southern Negro, or for that matter, for the Northern Negro. The achievements of the colored people of the 1950s merit at least provisional applause. They are fighting their way out of millennial shadows—and more power to them! If an arriving generation of Negro children can sustain this momentum, the race should move ahead, first within itself, as Dr. Conant pleads, and in time—*in time*—toward equality with the larger and more established community around it. When that hour of equality arrives—whenever that hour arrives—white "prejudices" predictably will dissolve; there no longer would be a basis for them. What comes thereafter I cannot suggest, but it is reasonable to surmise that barriers once lowered will not thereafter be raised capriciously again. When the Negro race proves itself, in terms of Western values of maturity and achievement, it will be time enough to talk of complete social and economic integration. Until then, it is pointless to argue sociology; it is more useful, in every way, to meditate upon the transcendent issues of the law.

Part II

The Law

I think the proper course is to recognize that a State legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain.

—Oliver Wendell Holmes.

I

On May 17, 1954, the Supreme Court of the United States handed down its unanimous decision in the *School Segregation Cases.* By general agreement, this decision is regarded as the court's most momentous opinion of this century; indeed, only the court's opinion of 1856 in the *Dred Scott* case is thought to have had greater impact upon the American people or upon the course of historic events. Because of its destructive effect upon the stability of law and the permanence of long-established institutions, the school decision, in my own view, surpassed *Scott* v. *Sanford* in the area of jurisprudence gone mad. In one stroke, the Warren court violated those precepts of judicial restraint and constitutional interpretation which it most frequently has insisted on in the past; it transformed itself into a superlegislature—more, it usurped the functions of constitutional amendment that lie with not fewer than three-fourths of the States. Abandoning law, the court wedded sociology; discarding eighty years of unbroken precedent, members of the court substituted their own notions of psychology and moral fitness for the plain and palpable meaning of the Fourteenth Amendment in terms of racially separate public schools. And having prohibited unto the States the exercise of a power the States had been exercising with judicial approval since 1868, the court capped its day's work by decreeing an end to segregation in schools of the District of Columbia. This latter stroke was achieved by judicial *coup de main* that left even the court's best friends embarrassed; what happened, Ralph Catterall has remarked, is that the court declared "unthinkable" that which had been universally thought for 166 years.

This is the indictment the South brings against the Warren court for *Brown* v. *Board of Education* and the subsequent judicial progeny of that May afternoon. In one sense, it

doubtless is futile to reargue *Brown;* as the court defiantly indicated by its unprecedented action in signing every judge's name in 1958 to *Cooper* v. *Aaron,* the principles it boldly put forward in 1954 are not to be reconsidered so long as the court's present members may live. But it is important, nonetheless, that the South's protest be understood and regularly renewed, lest it be supposed that with the passage of time the court's action has been condoned and forgiven.

The South's position rests upon a foundation of law, history, and constitutional construction as old as the Union itself. Ours is the ancient doctrine of State powers—not of State rights, but of State *powers.* This principle is the *élan vital* of the American Republic; it takes in the whole body of governmental and philosophical principles by which American greatness has been achieved. The doctrine embraces that delicate balance in State and Federal relations which keeps the whole watchworks moving; it depends for its success upon the right of the States to be wrong—to be foolish, to be unwise, to be out of step, to do "those acts and things which independent States may of right do," simply because they are States. And unless this delicate balance is preserved, and the rightful powers of the States guarded from continued encroachment, the whole organism of American government will be subtly transformed, without the expressed consent of the people governed, from the federalism that has provided its greatest strength to an immoderate centralism that will prove its greatest weakness. In maintaining its case, the South is no longer fighting the question of separate schools or even a question of race relations at all; it is contending, rather, for the preservation of an American plan of value to all the States and all the people. What is lost to the Southern States, in terms of political powers, is lost to all States; and the imposition of court-ordered prohibitions in one field makes the next imposition that much easier. By the court's decree of 1954, the South's largest, most expensive, most important, most cherished public institutions—our public schools—were thrown into potential jeopardy and chaos. Whose most cherished institutions will be next?

II

The South's legal position in the school controversy is essentially a constitutional position; it cannot be fully understood without some understanding of how the Southerner views the Constitution. He views it through the eyes of the States. These are to him, as Oliver Wolcott of Connecticut called them, "the pillars which uphold the general system."

Most readers of this essay, it may be assumed, have a good working knowledge of the Constitution. Some will not; they may never have read the Constitution, line by line and word by word; they know its provisions vaguely, not explicitly, and the trail that led from the creation of States to the formation of a Union is as remote to them as a path through the Pleiades. Hence this hornbook review. And if Jefferson's Declaration of Independence seems irrelevant to the South's position in *Brown* v. *Board of Education,* it is only because too much emphasis has been put on the Declaration's first few lines and not enough on its last.

Perhaps in the divine plan, all men are indeed "created equal." Here on earth they patently are not. Jefferson's opening hyperbole was never meant to be taken literally. But he did mean for the closing lines to be taken, at international law, for precisely what they were—a declaration that the colonies once tied to Britain, were now *free and independent States*—

> and that as Free and Independent States, they have full power to levy War, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.

In that moving Declaration, nothing was said of the birth of a "nation." In truth, nothing was said of a "nation" in the Articles of Confederation, or in the Constitution that succeeded the Articles. The Declaration was the act of "one People," but the political aim in the decade that followed the Declaration of 1776 was to form a more perfect Union —a union of separate, sovereign States, acting jointly for some purposes, but acting individually for others. And the political genius of the founding architects who designed this structure is the very genius so widely disdained by the busy

planners and amateur carpenters of our own time.

What did the Declaration assert the function of government to be? Why is it that governments are instituted among men? The answer, in Jefferson's phrase, is that governments are instituted among men *to secure rights*— not to grant rights, which a free people have to begin with, but only to secure rights. And where does government derive its powers in this regard? It derives its just powers "from the Consent of the Governed," and from no other source. How is this consent manifested? The answer lies in the whole of the republican process, which in the United States is a process exercised entirely through the actions of the people *in their States.*

The colonists who cast off the yoke of Great Britain did not propose to take on a fresh yoke of their own contriving in its place. The sum of their charges against the Crown was that George III had sought to establish "an absolute tyranny over these States." He had "erected a multitude of New Offices and sent hither Swarms of Officers to harass our People and eat out their Substance." In the formation of a new and independent government, the founding fathers were determined to minimize the opportunities for new tyranny to come into power. And toward that end, they were determined that the powers of government should be fragmented, and partitioned off, and kept securely under leash. They feared excessive "bigness" for the best of all reasons, that excessive bigness ought always to be feared when the liberties of a people are at stake. They sought to provide a check here, a balance there, a string of unequivocal prohibitions somewhere else. They insisted always upon a reservation to the people themselves of powers ungranted. These were the prudent goals the greatest political minds of our country sought to achieve.

Their first handiwork, the Articles of Confederation, is too much denounced and too little read. "This despised government," said Patrick Henry, defending the Confederation, "merits, in my opinion, the highest encomium: It carried us through a long and dangerous war; it rendered us victorious in that bloody conflict with a powerful nation; it has secured us a territory greater than any European monarch possesses;

and shall a government which has been thus strong and vigorous be accused of imbecility and abandoned for want of energy?" It is popularly supposed that when the delegates assembled at Philadelphia in 1787, they tossed the whole of the Articles unceremoniously aside, and set out from scratch to compose a Constitution. They did nothing of the sort. The revisions they made were fundamental, of course, but the principles of political power under which the United States live today are in essence the principles embodied in the Articles of Confederation.

Here in the Articles are to be found many of the phrases, and indeed, many of the specific provisions, that endure in the Constitution. The genesis of the Tenth Amendment appears as the first substantive clause in the compact: "Each State retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

Article III bound the States in a firm league of friendship "for their common defense, the security of their Liberties, and their mutual and general welfare"; the phrases were to reappear in the preamble to the Constitution of 1787. Article IV guaranteed to the inhabitants of each State "all privileges and immunities of free citizens in the several States," a guarantee carried over to Article IV, Section 2. The extradition of fugitives from one State to another, the rule of "full faith and credit" among the States, the immunity of Congressmen, and the flat prohibition upon the granting of titles of nobility all stem from the Articles. It often is forgotten, but the States laid upon themselves in the Articles of Confederation many of the prohibitions they were to accept a few years later in the Constitution: No States were to enter into any compact without the consent of Congress; no States were to keep troops or ships of war in time of peace without the consent of Congress "unless such State be actually invaded by enemies, or . . . the danger is so imminent as not to admit of delay," a provision echoed to this day, almost exactly, in Article I, Section 10. The powers vested in the Congress under the Articles of Confederation also have a familiar ring—to coin money, fix standards of weights and

measures, regulate trade, establish post offices, borrow money, build and equip a navy, and appropriate funds "for defraying the public expenses."

But the Articles of Confederation, for all the thoughtful provisions they provided as progenitors of the Constitution, had serious and admitted defects as well. If there was to be something more than a "firm league of friendship" among sovereign States, a government had to be created capable of acting upon individuals as such. The most devoted friend of "States' rights" willingly concedes that the "more perfect Union" provided for in the Constitution of 1787 created a nation, even if the Constitution described it only as a "Union," or as "the land." Obviously, the supremacy clause in Article VI was something new, not in degree, but in kind: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

That clause alone, coupled with Article III and with John Marshall's effective establishment of the principle of judicial review, created the "one out of many" that is the American Republic. Yet the objective student of public affairs who would understand the South's classic and traditional position in advocacy of States' rights should devote some thoughtful attention to certain aspects of the Constitution that have remained unchanged from the very beginning of the Union, surviving civil war and the growth of nearly two centuries—aspects that remain unchanged to this day.

At the risk of being tedious, it is necessary to examine the Constitution as it is, and not as centralizers might wish it to be. This is our organic law, the basis of our public institutions; the spirit that lives and breathes in it is the American spirit, and the great beams and foundation stones of this written compact support the whole structure of our government. The few paragraphs that follow may seem elementary. They are, in fact, essential to an appreciation of what was wrong with *Brown* v. *Board of Education* in 1954.

The preamble itself offers the first source of misunderstanding. It begins, of course, "We the people of the United States," and for 175 years superficial students of the Constitution have been crying triumphantly that the opening three words prove the existence of some national democracy: "We, the people." The demonstrable facts prove no such thing. On Monday, August 6, 1787, the Philadelphia convention received its first full draft of a Constitution. The preamble submitted by South Carolina's John Rutledge on that day read as follows: "We the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity." The preamble in this form was adopted the following day without dissent, and indeed without debate. It was not until September 10, when the weary delegates were ready to have the final document whipped into form by a committee on style, that the presumptuousness of the draft preamble became apparent. James Wilson of Pennsylvania made the point that it would be "worse than folly to rely on the concurrence of Rhode Island." The State of New York, he observed, "has not been represented for a long time past in the Convention." North Carolina's agreement was most uncertain. Many individuals from other States had spoken against the plan. And though Wilson was here addressing himself to a specific proposal that the draft Constitution be submitted first to the Congress, rather than directly to the States, his remarks made obvious good sense to members of the committee on style. They prudently recast the preamble to omit all mention of specific States—how could they know which nine would bind themselves by ratification?—and the preamble emerged as we know it. The point is that there was not the slightest doubt in the minds of the delegates at Philadelphia, or in the minds of the State conventions thereafter, that "We the people" meant, as Madison said, "We the people of the States as thirteen sovereignties."

The first eight words of Article I are important: "All legislative powers herein granted shall be vested. . . ." We are

dealing, at the outset, as the careful choice of a noun makes clear, with *powers,* and with a specific kind of power: *legislative* power. These powers are "granted *herein,*" which is to say, granted by the ratifying States in the Constitution itself, and in no other place; and these powers are to be "vested" (a most judicious verb) in the Congress.

In Section 2 of Article I, the first of more than ninety references to "the States" appears: The House of Representatives is to be composed of members chosen every second year "by the people of the several States." No congressional district ever may extend across a State line, for "the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." Moreover, every Representative must be "an inhabitant of that State in which he shall be chosen." Then follows the enumeration of the States to whom the Constitution would be submitted, if they wished to enter the Union: The State of New Hampshire shall be entitled to choose three members of the House, Massachusetts eight, and so forth.

Section 3 deals with composition of the Senate. A preposition is important here: To become a Senator, a man must be an inhabitant of that State *for* which he shall be chosen. From the beginning, the concept has been that Representatives represent people, or groups of people, or districts of people; Senators speak for the larger, mystical entity of the States themselves.

Section 4 re-emphasizes the status and function of the States, even as it lays down the first of the limitations upon State power voluntarily accepted by the ratifying members of the Union: "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof: But the Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators."

In Section 5, the first of many limitations upon the central government appears: Each house of the Congress must keep a journal of its proceedings, and at the desire of one-fifth of the members present, must record the individual yeas and nays. Close study of the Constitution will disclose many such restrictive provisions, for the Constitution is in many respects

a negative instrument; almost every delegation of power is followed at once by a snatching back, or by a qualification, or by a jealous and suspicious prohibition. The Constitution abounds in reservations, in neithers, noes, and buts.

Section 8 defines the powers of the Congress, and characteristically limits these powers even as it grants them: The Congress may lay and collect taxes, "But all duties . . . shall be uniform throughout the United States"; the Congress may raise and support armies, "but no appropriation of money to that use shall be for a longer term than two years"; the Congress may provide for organizing and arming the militia, "reserving to the States respectively the appointment of the officers"; the Congress shall exercise exclusive power over the seat of the national government, but its purchase of other places is dependent upon "the consent of the legislature of the State in which the same shall be."

In Section 9, one of the clauses appears that the Supreme Court was to forget in 1954—a provision specifically recognizing and sanctioning the institution of slavery as a custom in no way violative of the Fifth Amendment's guarantee that no person may be deprived of his liberty without due process of law. No friend of the court yet has been able to explain exactly how a constitutional provision that did not prohibit slavery could be interpreted to prohibit racially separate but equal public schools in the District of Columbia. No matter. The more significant provisions of Section 9 go to the nine flat prohibitions therein placed upon the Congress. Here the States laid down the law to the joint government they were creating: The Congress could not (1) interfere with the importation of slaves prior to 1808; (2) suspend the privilege of the writ of habeas corpus; (3) pass a bill of attainder or (4) an ex post facto law; (5) impose a direct tax except in proportion to the census; (6) place a tax or duty on articles exported from any State; (7) give preference in any regulation of commerce or revenue to the ports of one State over those of another; (8) draw money from the Treasury except as a consequence of appropriations made by law, or (9) grant titles of nobility.

Section 10 follows with fourteen prohibitions the States agreed to put upon themselves by the Constitution. No State

may (1) enter into a treaty or confederation; (2) grant letters of marque and reprisal; (3) coin money; (4) emit bills of credit; (5) make anything but gold and silver coin legal tender; (6) pass any bill of attainder or (7) ex post facto law or (8) law impairing the obligation of contracts; (9) grant any title of nobility; or, without the consent of the Congress, (10) lay any duty on imports or exports; (11) lay any duty of tonnage; (12) keep troops or ships of war in time of peace; (13) enter into any compact with another State, or (14) engage in war unless actually invaded or in such imminent danger as will not admit of delay.

Article II. The provisions of the Constitution dealing with the election and office of the President are significant in this brief review because of the indispensable function that is assigned to the States as States, even in the choice of a President. As a matter of law, the popular vote that is cast for presidential candidates in the Republic as a whole is meaningless. What counts, plainly, is the vote within each State, for this choice by the people within their State by custom governs the action of presidential electors who are appointed in each State "in such manner as the legislature thereof may direct." And should the presidential electors fail to give any one candidate a majority of their votes, the election goes immediately to the House of Representatives where the votes shall be taken "by States, the representation from each State having one vote."

The federal nature of our Union also is made apparent in the provisions of Section 2, which leave to the States the command of their own militia except "when called into the actual service of the United States," and vest in the Senate a powerful control upon the executive power of the President. It is only with the advice and consent of the Senate that the President may make treaties, appoint ambassadors, and name judges of the Supreme Court and other officers. And the consent of Senators, to repeat, in a very real sense is the consent of the States as such.

Article III. The Constitution vests the judicial power of the United States (with such exceptions, and under such regulations as the Congress shall make) in one Supreme Court and in the inferior tribunals established by law. The chief point

the advocate of States' rights might emphasize here is that the high court's power is entirely *judicial* in nature; its jurisdiction extends to cases in law and equity arising under the Constitution, under Federal law, and under treaties made under the authority of the United States, and to "controversies" in which a State as such, or diversity of citizenship on the part of litigants, may play a part.

Section 2 makes clear that the States must be considered separate entities in the trial of crimes, just as they are considered separate entities in the election of Congressmen: Crimes are to be tried "in the State where the said crimes shall have been committed."

Article IV. All four sections of the Fourth Article are concerned with the States, their citizens, their obligations to other States, and their rights as members of the Federal Union. Here is the provision that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." The second section explicitly acknowledges State citizenship as distinct from United States citizenship. It says that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This section also provides for the extradition of persons charged with crime, and prior to the Thirteenth Amendment, for the compulsory return of fugitive slaves. Section 3 protects the States from having new States carved out of their territory. Section 4 guarantees "to every State in this Union a republican form of government."

Article V. The brief provision dealing with amendment of the Constitution is of paramount importance in any understanding of the South's protest against the school decision. John Taylor of Caroline once defined sovereignty as "the will to enact, the power to execute." John Marshall spoke in the *Cohens* case of the "supreme and irresistible power to make and unmake." Article V defines and locates this supreme power—not in "the whole body of the people," as Marshall carelessly remarked, but in "three-fourths of the several States."

The scheme for amendment of the Constitution goes to the very essence of what makes the American Union great and unique among the powers of the earth: We do not accept

the supremacy of "majority rule." If there is one ancient parliamentary principle to which the Constitution does *not* subscribe, it is the principle of majority rule. In every major question touched upon in the Constitution—for the impeachment of officers, the overriding of a veto, the ratification of a treaty, the proposing and adopting of amendments to the Constitution—in all of these, mere majorities are not enough. Some margin of more than a majority is required. And when it comes to changing the Constitution itself, the explicit provision is that no change can be made without the expressed and tacit approval of at least three-fourths *of the States.* The laws, customs, desires, preferences of a minority of the States are not to be blindly overthrown by any 51 per cent of the people; and until the *Brown* case came along, it was not imagined in the South that Article V could be suspended, and the Constitution effectively amended, by the will of nine judges.

The substance of Article VI has been quoted earlier, and the concluding Article VII is notable chiefly for the light it sheds upon the relationship of the States to one another within the Federal Union: "The ratification of the conventions of nine States," it says, "shall be sufficient for the establishment of this Constitution *between the States so ratifying the same.*" The language plainly justifies what sometimes is referred to disparagingly as "the compact theory," as if a concept of the Constitution as a compact "between the States so ratifying the same" were no more than a gauzy illusion of Calhounian metaphysicians. The Constitution is in fact, as even Mr. Justice Douglas has described it, a "compact between sovereigns" (*New York* v. *United States,* 362 U. S. 572). The United States of America, as a corporate being, came into existence with New Hampshire's ratification as the ninth State on June 21, 1788. If Virginia, New York, North Carolina, and Rhode Island thereafter had failed to ratify (the vote was 89 to 79 in Virginia, 30 to 27 in New York, and 34 to 32 nearly two full years later in Rhode Island), they might be to this day sovereign and independent States, small nations, republics in their own regard. It was by their own voluntary actions that the States accepted the Constitution and agreed to be bound by it. As partners in a joint venture

they entered into compact; and the Constitution was, and is, the written instrument by which their mutual understanding is set down, not to be altered without the consent of three-fourths of them.

The ratifying conventions, especially those in the key States of Virginia and New York, provide abundant documentation of the prophetic vision with which the Founding Fathers sought to protect their infant Republic from the predictable excesses of "big government." Our nation was created in an abiding sense of distrust; most of *The Federalist* papers are devoted toward soothing and allaying the fears of those who apprehended that one day the central government would get out of hand. "Suspicion is a virtue," cried Patrick Henry in the Virginia convention, "as long as its object is the preservation of the public good, and as long as it stays within proper bounds. . . . Guard with jealous attention the public liberty! Suspect everyone who approaches that jewel! . . . I shall be told I am continually afraid; but, Sir, I have strong cause of apprehension. In some parts of the plan before you, the great rights of freemen are endangered, in other parts absolutely taken away. . . . But we are told that we need not fear, because those in power, being our representatives, will not abuse the powers we put in their hands. I am not well versed in history, but I will submit to your recollection, whether liberty has been destroyed most often by the licentiousness of the people, or by the tyranny of rulers?"

To put at rest these widespread fears of excessive centralism, the ratifying States demanded a series of explicit amendments to the Constitution, intended to place further express prohibitions upon the Congress. These amendments became, of course, the Bill of Rights; and important as the first eight amendments are, the forgotten Ninth and Tenth speak with telling eloquence of the nature of our political institutions. The Ninth asserts that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." And the Tenth, once insisted upon by New York as positively as by Virginia, declares in words too clear possibly to be misunderstood that "the powers not delegated to the United States by the Constitution, nor

prohibited by it to the States, are reserved to the States respectively, or to the people."

There in the Tenth Amendment is the key that should unlock all mysteries of construction, wherever the State and Federal relationship is at issue. It does not treat of "rights." Rights belong to people, and are retained by them in the Ninth. The Tenth deals with powers, and its careful wording spells out the essence of our Union. The Congress has no powers whatever, save those the States have delegated to it "by the Constitution." If authority for some congressional act cannot be found in the Constitution, the authority does not exist, for the Congress has no implied or inherent powers; its powers begin and end with the powers enumerated in the written instrument itself—including, to be sure, the power to adopt "necessary and proper" laws to put the powers to work. All other powers, not prohibited to the States *by the Constitution,* are expressly reserved to the States respectively, or to the people.

There is great meaning here for the issue that prompts this brief. What the South has said, repeatedly, earnestly, unavailingly, is that the power to operate public schools plainly is a power reserved to the States respectively by the Constitution. The power is not delegated to the United States; it is not prohibited to the States by the Constitution; therefore it remains with them. The power to operate public schools necessarily embraces the power to decide what kind of public schools will be operated; and so long as the States do not violate any prohibition laid upon them *by the Constitution,* they are free to operate whatever schools they please. Their contention is that nothing in the original Constitution of 1788, nothing in the pre-War amendments, nothing in the Reconstruction amendments, and nothing added to the Constitution in this century was intended to prohibit to the States the power to operate racially separate public schools. On the contrary, the South contends that this power plainly was recognized, acknowledged, and judicially sanctioned in States North and South for eighty years after the Fourteenth Amendment became operative; and we deny that a construction so long placed upon the Constitution, in an area of public affairs so vitally and intimately affecting the daily lives of

so many millions of persons, validly may be wiped out by a stroke of judicial pens.

III

The four cases that were to coalesce as *Brown* v. *Board of Education* had their beginnings in four widely separated proceedings. In the first of the suits, Harry Briggs, Jr., and forty-five other Negro children of Clarendon County, S. C., brought an action on December 22, 1950, against R. W. Elliott and other members of the county's School District 22. The following March, in Kansas, Oliver Brown and other colored children filed suit against Topeka's board of education. In May 1951, Dorothy E. Davis and other Negro plaintiffs in Prince Edward County, Va., launched their proceeding against county officials. Nine months later, in the early spring of 1952, Ethel Louise Belton and others sued for nondiscriminatory admission to the public schools of Hockessin and Wilmington, Del.

Each of the suits was carefully coordinated with the others by the National Association for the Advancement of Colored People, and each had the same object—overthrow of the "separate but equal" rule that had governed the operation of racially separate schools since Reconstruction days. Counsel's plan was to show, first, that school facilities for white and Negro children were not equal as a matter of fact, but this was not so important; beyond this—and it was by far the more significant aim—the object was to prove, as Thurgood Marshall said in South Carolina, that "the segregation of pupils in and of itself is a form of inequality," and hence a violation of the Fourteenth Amendment's requirement of equal protection of the law.

The Clarendon County case, which came on for trial before a three-judge Federal court in Charleston May 28–29, 1951, provided the pattern. The pleadings were drafted by Marshall himself and by Robert L. Carter of New York, the two top lawyers for the National Association for the Advancement of Colored People. (In 1961, Marshall became a Federal circuit judge.)

The facts were not in great dispute. At that time, there were in Clarendon County as a whole 6500 Negro children

and 2375 white children. District 22 had 684 Negro elementary pupils and 150 Negro high school pupils, plus 102 white elementary pupils and 34 white high school pupils. The Negro pupils of District 22 went to three schoolhouses: Scott Branch (a combined elementary and high school), Liberty Hill, and Rambay. All the white pupils went to the Summerton elementary and high school. It was shown that the facilities for white children, though old (the Summerton high school was built in 1907), were in many respects far superior to the facilities for the Negro children. The two-room Rambay School and the four-room Liberty Hill School had no running water, and Rambay had no electric power. The Negro schools had few of the educational aids provided at Summerton; their playgrounds were inferior; toilet facilities at the two smaller buildings were outside privies. County officials pointed out that neither water nor sewage lines existed in the area of the two schools; in the remote rural section served by Rambay, no electric power was available to anyone; the library for colored pupils at Scott Branch, they said, was superior to the library for white pupils at Summerton; and they denied any discrimination in transportation, janitorial services, and other amenities. As the case went to trial, however, counsel for Clarendon County confessed a general inequality in physical facilities, described a State-wide plan instituted by Governor Byrnes for school improvements, and pledged a prompt effort to achieve equality.

By far the most significant evidence in the Clarendon County case came from a group of witnesses summoned by the plaintiffs to testify on the psychological effects of segregation itself. Kenneth Clark, assistant professor of psychology at the New York City College, was a key figure in this phase of the NAACP's assault. In the *Teachers' College Record* for October 1960, he revealingly describes the fashion in which he was approached by Carter in February 1951, on behalf of the NAACP's Legal Defense Fund, to prepare exhibits and test findings that would support the plaintiffs' side in the School Segregation Cases. Carter wanted material that would show how "segregation inflicts psychological damage on its victims," and Clark collaborated with the lawyers in preparing psychological data "to be used in whatever ways they

believed most effective in the presentation of their case." As part of the plan, Clark himself went to Clarendon County, and administered the "doll test" to twenty-six Negro children; in this test, the subjects are shown two dolls identical except for skin coloring—one doll is white, the other brown. They then are asked which doll they like best, which doll is "nice," which doll is "bad," and which doll "is like you?" From the answers to these questions, Clark testified in the Clarendon case, "we get some picture of the child's concept of his own color, and we also get an indication of the child's anxieties and confusions about his color and his feelings." Not surprisingly, the twenty-six pupils Clark tested in Clarendon County were found to have been "definitely harmed in the development of their personalities."

Other witnesses for the plaintiffs included Harold McNalley, associate professor of education at Columbia Teachers College; Ellis O. Knox, professor of education at Howard University; James L. Hupp, professor of education and psychology at Wesleyan College of West Virginia; David Krech, professor of social psychology at Harvard; and Mrs. Helen Trager, a lecturer in psychology at Vassar. Their testimony, admitted over defense objections that it was irrelevant and immaterial, was intended to support the plaintiffs' primary contention that segregation, in and of itself, caused emotional damage to the Negro child, and that segregated schools could never be made "equal" as a matter of law.

On June 23, 1951, the Fourth Circuit's Chief Judge John J. Parker, joined by District Judge George Bell Timmerman, handed down an opinion in the Clarendon County case. The third member of the court, District Judge J. Waties Waring, strongly dissented to the Parker-Timmerman decision. The majority decree directed county officials to proceed at once with genuine equalization of public school facilities, but the court refused to upset the long-standing doctrine of "separate but equal." The late Judge Parker was one of the nation's most widely admired jurists, a North Carolinian who had then had more than twenty-five years' experience on the bench. His opinion (98 F. Supp. 529),

though it subsequently was to be reversed, merits respectful consideration in any study of the South's position.

On the key question developed by the plaintiffs—that segregation in itself is a denial of equal protection—Parker took a calmly judicial approach: This is a "matter of legislative policy for the several States," he said, "with which the Federal courts are powerless to interfere." He continued:

> One of the great virtues of our constitutional system is that, while the Federal government protects the fundamental rights of the individual, it leaves to the several States the solution of local problems. In a country with a great expanse of territory, with peoples of widely differing customs and ideas, local self government in local matters is essential to the peace and happiness of the people in the several communities as well as to the strength and unity of the country as a whole. It is universally held, therefore, that each State shall determine for itself, subject to the observance of the fundamental rights and liberties guaranteed by the Federal Constitution, how it shall exercise the police power, i.e., the power to legislate with respect to the safety, morals, health and general welfare. And in no field is this right of the several States more clearly recognized than in that of public education.

Judge Parker quoted from an opinion by the District of Columbia's Judge E. B. Prettyman, an outstanding jurist who had considered the question a year earlier in *Carr* v. *Corning* (182 F.2d 14). There Judge Prettyman raised the question of whether the Fourteenth Amendment had lifted the entire problem of race relations out of the hands of all legislatures and settled it. "We do not think it did," he said. "Such problems lie naturally in the field of legislation, a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstance. We do not believe that the makers of the first ten amendments in 1789 or of the Fourteenth Amendment in 1866 meant to foreclose legislative treatment of the problem in this country. This is not to decry efforts to reach that state of common existence which is the obvious highest good in our concept of civilization. It is merely to say that the social and economic inter-relationship of two

races living together is a legislative problem, as yet not solved, and is not a problem solved fully, finally or unequivocally by a fiat enacted many years ago. We must remember that on this particular point we are interpreting a Constitution and not enacting a statute."

Judge Parker went on in his own opinion to review decisions of the Supreme Court sustaining the separate-but-equal doctrine, and to distinguish between education at the graduate-school level and education at the elementary-school level. In dealing with the grammar schools, under systems of compulsory attendance, local lawmakers have problems of educational policy that must take into account not only questions of instruction "but also of the wishes of the parent as to the upbringing of the child and his associates in the formative period of childhood and adolescence." If public education is to have the support of the people through their legislatures, Judge Parker said, "it must not go contrary to what they deem for the best interests of their children." The plaintiffs' expert witnesses had testified that mixed schools would benefit children of both races by exposing them to democratic opportunities in community living. Defense witnesses, on the other hand, had testified that mixed schools would result in friction and tension. Said the court:

> The questions thus presented are not questions of constitutional right but of legislative policy, which must be formulated, not *in vacuo* or with doctrinaire disregard of existing conditions, but in realistic approach to the situations to which it is to be applied.... The Federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the States in such matters, however desirable such policies might be in the opinion of some sociologists or educators. For the Federal courts to do so would result, not only in interference with local affairs by an agency of the Federal government, but also in the substitution of the judicial for the legislative process in what is essentially a legislative matter.
>
> The public schools are facilities provided and paid for by the States. The State's regulation of the facilities which it furnishes is not to be interfered with unless constitutional rights are clearly infringed. There is nothing in the

> Constitution that requires that a State grant to all members of the public a common right to use every facility that it affords.... The equal protection of the laws does not mean that the child must be treated as the property of the State and the wishes of his family as to his upbringing be disregarded.

In oral argument of the case, Thurgood Marshall had urged the trial court to create judicial history by abandoning, on its own motion, the precedents of many years in support of "separate but equal." Judges Parker and Timmerman were not willing to do so. These unreversed decisions, they said, were squarely in point and conclusive. If this long line of cases were to be overturned or held outmoded, the Supreme Court itself would have to take that step. And Parker concluded:

> To this we may add that, when seventeen States and the Congress of the United States have for more than three-quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that Court included Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts. *The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics.* [Emphasis supplied.]

In the course of time, to be sure, the Warren court was to do precisely what Judge Parker said judges ought never to do, but nearly three years were to elapse before that

famous decree would descend upon the South. Meanwhile, the other three cases, in Kansas, Virginia, and Delaware, were still to be tried. They followed the Clarendon pattern rather closely. In Topeka, counsel for the Negro plaintiffs made little effort to show physical inequalities in the city's white and Negro schools. The city was then operating eighteen white schools and four Negro schools, under a State law permitting, but not compelling, racial separation. The trial court found as a fact (98 F. Supp. 797) that the facilities were substantially equal: "It is obvious that absolute equality of physical facilities is impossible of attainment." The broader question presented by the plaintiffs "poses a question not free from difficulty," but Judge Walter A. Huxman and his colleagues in Kansas was no more disposed than Judge Parker and Judge Timmerman in South Carolina to upset long-established precedents. The three-judge court unanimously upheld segregation in the Topeka schools.

In Virginia, the Prince Edward County case was tried February 25–29, 1952, before a court composed of Circuit Judge Armistead Dobie and District Judges Sterling Hutcheson and Albert Brvan. Once again, as in South Carolina, the defense confessed the physical inequality of white and Negro school facilities, and accepted a court order requiring prompt and diligent efforts to make the facilities equal. But here, too, physical equality was not the principal issue. The question was whether segregation in itself violated the Fourteenth Amendment. On this point, the Negro plaintiffs produced a fresh array of sociologists, anthropologists, psychologists, and psychiatrists to testify to the harmful effects of segregation; the defense produced "equally distinguished and qualified educationists and leaders in other fields" who emphatically asserted that, given equivalent physical facilities, offerings, and instruction, the Negro would receive in a separate school the same educational opportunity he would obtain in a mixed school. Each of the expert witnesses, said Judge Bryan, "offered cogent and appealing grounds for his conclusion."

But the three Federal jurists in Virginia took the same position that Parker and Timmerman had taken in Clarendon County—in brief, that the only duty of a Federal court in

such a case is to determine whether a State's policy is so arbitrary and capricious as to be wholly without support in reason. Here, the "unbroken usage in Virginia for more than eighty years" offered evidence of a policy reflecting the established mores of the people. So distinguished a witness as Virginia's Colgate W. Darden, a former Governor and then president of the University of Virginia, had testified that elimination of separate schools would injure both races. Under the circumstances, the court was unable to say that the State's policy of racially separate schools was without substance in fact or reason:

> We have found no hurt or harm to either race. This ends our inquiry. It is not for us to adjudge the policy as right or wrong—that the Commonwealth of Virginia shall determine for itself.

Last of the four cases to be heard was in Delaware, where the State Chancellor on April 1, 1952, entered an order directing the admission of a number of Negro children to the public schools of New Castle County on a nondiscriminatory basis (87 A.2d 862). The evidence was not in dispute: The colored high school students were denied admission to Claymont High School and were required instead to attend Howard High School in neighboring Wilmington. Elementary pupils were barred from Hockessin School No. 29 and required instead to attend the all-Negro Hockessin School No. 107. The Chancellor found that inequalities did in fact exist, in teacher training, pupil-teacher ratio, extracurricular activities, transportation, physical plant, and the like. Though he was inclined to agree that segregation in itself "results in Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children," the Chancellor was unwilling to decide the case on this new ground. On the merits of their case alone, under the separate-but-equal rule, the Negro plaintiffs were entitled to immediate relief. On August 28, 1952, the Supreme Court of Delaware affirmed (91 A. [2d] 127). And the Supreme Court of the United States, having granted certiorari in each of the cases, set them for joint argument December 9–11, 1952.

IV

The Supreme Court of the United States then was headed by Fred M. Vinson of Kentucky, as Chief Justice. Others who heard the ten hours of argument that December were Hugo L. Black of Alabama, Felix Frankfurter of Massachusetts, William O. Douglas of Connecticut, Robert H. Jackson of New York, Harold H. Burton of Ohio, Tom C. Clark of Texas, Sherman Minton of Indiana, and Stanley Reed of Kentucky.

It is difficult—impossible might be a better word—to guess at the outcome of a Supreme Court case by attempting to read the minds of the judges through the questions asked from the bench. Here, however, it seemed unusually clear that the court was seriously divided. Burton indicated the course that ultimately was to be taken. During argument on the Topeka case, he put a question to Paul E. Wilson, assistant attorney general of Kansas: "Don't you recognize it as possible that in seventy-five years the social and economic conditions of the Nation have changed so that which might have been a valid interpretation of the Fourteenth Amendment seventy-five years ago would not be valid today?" Wilson replied that he recognized the possibility, but did not believe the record disclosed such a change. Evidently recalling some of Judge Parker's language in the Clarendon County decision, Burton persisted: "But that might be different from saying that these courts of appeals and State supreme courts have been wrong for seventy-five years?" Wilson agreed, but made the point that until the Supreme Court itself overturned its own precedents, no other guide to the law was available. When John W. Davis arose to argue the South Carolina appeal, Burton put the same question to him. Davis said: "My answer to that is that changed conditions may affect policy, but changed conditions cannot broaden the terminology of the Constitution." Changes in social or economic conditions, Davis thought, raised "an administrative or political question, not a judicial one." Burton subsided with a remark that he viewed the Constitution as a living document "that must be interpreted in relation to the facts of the times in which it is interpreted."

Pointedly stating a conflicting view, Frankfurter interrupted Thurgood Marshall's argument at one point to recall that the court recently had upheld the power of Louisiana to restrict the calling of river pilots "to the question of who your father was." The court sustained that legislation, he said, "not because we thought it admirable or because we believed in primogeniture, but because it was so imbedded in the history of that problem in Louisiana that we thought on the whole that was an allowable justification."

At the conclusion of the argument, attorneys on both sides were hopeful. The Negro forces felt reasonably certain they had Douglas, Black, and Burton; the State attorneys thought they had impressed Jackson, Minton, Frankfurter, and probably Clark. Vinson and Reed were question marks. It was anticipated that a decision would be handed down by a divided court some time in March or April.

Instead, time ran on until June 8, 1953, when the court, unable to reach any decision on which a majority of the court could agree, set the case for reargument on five questions. Two of the questions were technical in nature: Assuming it were decided that segregation in itself violates the Fourteenth Amendment, how should decrees be formulated? How should the cases be handled on remand to the lower courts? The other three questions went to the very heart of American constitutional law.

Question 1: What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

The Supreme Court posed this first question, in theory at least, for one reason only: Its object was to determine whether the power to operate racially separate schools ever had been prohibited to the States *by the Constitution;* for if this power had not been prohibited to the States by the Constitution, it was theirs to exercise respectively, for good or ill. (It was conceded that the power never had been

prohibited to them by any law of the United States adopted pursuant to the Constitution). Obviously, nothing in the Constitution possibly could prohibit this power to the States except Section 1 of the Fourteenth Amendment. This section imposes three prohibitions on the States: (1) No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; (2) nor shall any State deprive any person of life, liberty, or property without due process of law; (3) nor deny to any person within its jurisdiction the equal protection of the laws.

In point of fact, it was only the third of these prohibitions that concerned the court. (A right to attend school in any particular State is not a privilege of a "citizen of the United States," but of a citizen of the State in question; and only by rather far-fetched reasoning could it be contended that by placing white children in one school and Negro children in another school, a State was depriving any person of life, liberty, or property without due process of law. From the beginning, the plaintiffs' case rested in an assertion that equal protection had been denied the Negro pupils.) How was the court to be advised if this provision of the Fourteenth Amendment prohibited to the States the power to operate racially separate schools? Only one procedure is known to the law; it is the procedure used by the Supreme Court and by other courts from the very beginning of the Republic: *It is to determine the intent of the framers.* What did the Congress and the ratifying States *mean* by the Fourteenth Amendment? In terms of racially separate public schools, what did they intend the amendment to accomplish? What was their understanding? In construing a written Constitution, an inquiry into intent is paramount. Cooley's *Limitations* states the rule in this fashion:

> A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written Constitutions

would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. These beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving construction to a written Constitution not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty.... What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.

Chief Justice Taney made the same point in the *Dred Scott* case (19 Howard 393). It had been argued (this was in 1857) that public attitudes had changed enormously toward the Negro since the adoption of the Constitution sixty-eight years earlier. But should this shift in public attitude induce the court "to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted"? Taney thought such an argument "altogether inadmissible" in any tribunal called upon to interpret the Constitution:

> If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its

> adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes.

Many other authorities, over a span of generations, have said substantially the same thing about the necessity of courts' holding steadfastly to the demonstrable intention of a constitutional provision. "The ultimate touchstone of constitutionality," Frankfurter once asserted, "is the Constitution itself and not what we have said about it" (306 U. S. 491). Hughes urged his colleagues not to be swayed by arguments that extraordinary events may justify abandonment of the rule: "Extraordinary conditions do not create or enlarge constitutional power" (245 U. S. 495). Douglas, dissenting in *New York* v. *the United States* (326 U. S. 572), sternly lectured his brothers on their obligations in this regard; when a constitutional rule is to be fashioned that undermines the long-understood sovereignty of the States, he said, it ought never to be done by judicial construction: "Any such change should be accomplished only by constitutional amendment."

This solid principle of constitutional law was in the court's mind that day in June 1953 when it asked for reargument in the School Segregation Cases. What happened to the principle thereafter is sadly apparent: The court tossed it summarily to one side. But briefly, at least, the court recognized that in constitutional cases, clocks must always be turned back.

The NAACP, on behalf of the Negro plaintiffs, did its dead-level best to come up with some history to support its case. The story of the plaintiffs' exertions was confessed on

December 28, 1961, by Professor Alfred H. Kelly, of Wayne State University in Detroit, in an address before the annual meeting of the American Historical Association in Washington. Excerpts from his address were reprinted in the *U. S. News & World Report* of February 5, 1962. They provide a fascinating, and a sobering, revelation of what Negrophile zeal can do to an honest man.

"One day in early July, 1953," Professor Kelly began, "I received a letter from Mr. Thurgood Marshall."

Marshall wanted Professor Kelly to prepare a research paper that would support the NAACP's answer to the first question posed by the court. At stake was the venerable "separate but equal" rule, to which Professor Kelly, as a person, was deeply opposed. Marshall explained that the rule was crumbling and about to fall; but if the rule were to be overthrown after all these years, "it would entail a piece of judicial lawmaking which could be justified only by a philosophy of extreme judicial activism—and this at the hands of a Court wherein several expressed their disapproval of judicial activism and lawmaking by Court-made fiat." But if this revolution in the legal status of the Negro were to be achieved, the attempt had to be made—and Dr. Kelly was ready to help make it. After all, both the lawyers and the scholars at work on the case agreed that the old rule had to be disposed of—but how? Dr. Kelly paraphrased their dilemma:

> We would like to dispose of the Plessy rule, for once and for all....
>
> But we are fearfully embarrassed by the apparent historical absurdity of such an interpretation of the Fourteenth Amendment and equally embarrassed by the obvious charge that the Court will be "legislating" if it simply imposes a new meaning on the Amendment without regard to historical intent.

How to escape from this embarrassment? Why, historians must produce for the NAACP a plausible historical argument to justify the court in pronouncing (a) that the intent of the Fourteenth Amendment in this regard was unclear, or (b) that the amendment really had been intended, all

along, to abolish school segregation, or at least to sanction its abolition by judicial fiat.

So Dr. Kelly went to work. As a constitutional historian, he acknowledged what the South's attorneys were to contend, that the Fourteenth Amendment was the direct outgrowth of the Civil Rights Act of 1866. He did what a Southern lawyer or anyone else would do under the circumstances: He went to the *Congressional Globe* for the first session of the Thirty-ninth Congress of 1866 and read the debates himself. To his intense dismay, he found the *Globe* "had a good deal to say about school segregation." And at first blush, "most of what appeared there looked rather decidedly bad. . . ." Indeed, it looked as if John W. Davis, arguing the case for the South Carolina defendants, "would win the historical argument hands down!"

But Dr. Kelly spat on his hands and went to work. In the course of time, by his own candid and tortured admission, "I ceased to function as a historian, and, instead, took up the practice of law without a license."

> The problem we faced was not the historian's discovery of truth, the whole truth, and nothing but the truth; the problem instead was the formulation of an adequate gloss on the fateful events of 1866 sufficient to convince the Court that we had something of an historical case. . . .
>
> It is not that we were engaged in formulating lies; there was nothing as crude and naive as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts, quietly ignoring facts and, above all, interpreting facts in a way to do what Marshall said we had to do—"get by those boys down there."

Charitably, a curtain may be drawn over the agonizing sessions that Dr. Kelly and his associates, sincerely wedded to a social and legal cause, spent in pacing up and down a suite in the NAACP's headquarters on West 40th Street in New York, dictating and arguing and glossing over, "hammering out a strategy" that would contain some essential measure of historical truth, but yet . . . but yet. . . .

They produced a 235-page brief. It must stand as a pathetic monument to what happens when historians cease to be his-

torians and take up the unlicensed practice of law. The conclusions there drawn, that the "proponents of absolute equalitarianism emerged victorious in the Civil War and controlled the Congress that wrote the Fourteenth Amendment," are a bitter travesty upon the actual course of events. For it is plain to any objective student—to any man who will stand still long enough to ask and receive an answer to the elementary question, *What happened?*—that no such thing occurred. The visible, palpable, unrelenting, unavoidable truth is that Sumner and Stevens and their fellow radicals did not control the Congress in 1866; they did *not* get what they wanted in the Fourteenth Amendment; they got half a loaf at most: And the proof of the pudding may be found where it always lies, in what happened after the amendment was adopted.

The answer to the court's first question is perfectly clear: *Of course* the Congress that submitted the Fourteenth Amendment, and the States that ratified it, did not contemplate or understand that the amendment prohibited to the States the power to maintain segregation in the public schools. If they had contemplated or understood this, they would have abolished such segregation where it existed and shunned it in the schools thereafter. In the simple, homely, undeniable fact that such segregation was not abolished but rather was widely continued lies a complete answer to the court's question. It should have been a complete answer to the whole case.

Evidence to support this view may be adduced overwhelmingly from three principal sources: (1) Actions of the Congress itself; (2) actions of the State legislatures and constitutional conventions; and (3) decisions of State and Federal courts in the period immediately following adoption of the amendment.

1. Actions of the Congress itself. The Thirteenth Amendment to the Constitution, prohibiting slavery within the United States, or in any place subject to their jurisdiction, was proposed by the Congress on January 31, 1865, two months before Lee's surrender at Appomattox was to end the War for Southern Independence. Northern States promptly set the ratification process in motion, and with a cessation of hostilities in April, Southern States came along. During the

first week of December 1865, barely ten months after the Thirteenth Amendment had been proposed, the assents of Alabama, North Carolina, and Georgia brought the number of ratifications to twenty-seven—three-fourths of the thirty-six States regarded as then "in the Union" for constitutional purposes. On December 18, 1865, Secretary Seward declared the Thirteenth Amendment a part of the Constitution.

The Southern States that had been counted as never having left the Union, for purposes of ratifying the Thirteenth Amendment, soon discovered that for other purposes they were still out of the Union. They were denied what the Constitution promises every State—representation in the Congress by at least one member of the House and two members of the Senate—and they were permitted no hand in framing the second Reconstruction amendment that was to be submitted the following year. This task became the responsibility of a joint committee of six Senators and nine Congressmen, created in December at the request of Thaddeus Stevens.

During January and February 1866, while the committee was at work in executive sessions, the House and Senate completed action on the First Supplemental Freedmen's Bureau Bill. The act is important in tracing the meaning of the Fourteenth Amendment, for it explicitly defined the principal civil rights and immunities that were to be under constant discussion in the Congress for the next several months. This law guaranteed to the newly freed Negroes in the Southern States "the right to make and enforce contracts, to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold and convey real and personal property; and to have full and equal benefit of all laws and proceedings for the security of person and estate."

The Freedmen's Bill applied, by its own terms, only to the late Confederacy. Simultaneously, a legislative effort was launched to secure these same civil rights in the country as a whole. On February 2, after bitter debate on its constitutionality, what was to become the Civil Rights Act of 1866 passed the Senate. It went to the House, and in early March was favorably reported by the Judiciary Committee. During floor debate on March 13, Congressman Wilson of Iowa, chairman of the committee in charge of the bill, ad-

dressed himself to the bill's opening provision, declaring that "there shall be no discrimination in the civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery." This part of the bill, Wilson said, "will probably excite more opposition than any other." He undertook to allay apprehensions:

> What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. . . . *Nor do they mean that . . . their children shall attend the same schools. These are not civil rights or immunities.* [Emphasis added.]

The Civil Rights Bill passed the House by 111–38 on March 13; it was vetoed on March 27, and passed over the veto on April 9.

These dates are important. Late in February 1866, the Stevens Committee had brought into the House one draft of a proposed Fourteenth Amendment. It had been debated, and then sent back for more work. On April 21, a new draft came before the committee. On April 25, amendments were approved in committee that put the amendment in the form in which it finally was to become part of the Constitution. These changes wrote into Section 1 new prohibitions upon the powers of the States: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

When the proposed constitutional amendment reached the floor of the House on May 8, both its friends and its foes reached remarkable agreement on the amendment's primary purpose: to nail into the Constitution the Civil Rights Act of 1866 that on April 9 had been passed over the President's veto. Stevens reminded his radical colleagues that a mere law always was subject to repeal by a majority of the House and Senate: "And I need hardly say that the first time that the South with their copperhead allies obtain the command

of Congress it will be repealed." An opponent of the resolution, Rogers of New Jersey, said the Stevens measure "is no more than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill. . . ."

On the Senate side, when the resolution came there for debate on May 23, the same view was taken. Howard of Michigan, in charge of the paper, said the object was "to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power." Davis of Kentucky and Henderson of Missouri agreed. On June 8, the Senate voted in favor of the resolution, 33–11, with five Senators not voting; and on June 13 the House, which then had 184 members, completed action by concurring in the Senate amendments, 120–32, with 32 not voting. The House margin was four votes short of the two-thirds required under the Constitution for submitting an amendment, but the resolution was declared to be passed anyhow.

While all this was going on, other matters of course were coming before the Congress. One such matter was a bill passed in the Senate on May 21, providing for segregated schools in the District of Columbia. A companion bill, introduced in April, adopted in May, made effective in July, appropriated funds to the Negroes' segregated schools. And year after year, from that time on until 1954, the Congress continued to provide for racially separate schools in the District of Columbia.

Not one iota of evidence can be adduced from the annals of Congress in 1866 to show that any responsible member of the House or Senate believed the Fourteenth Amendment in any fashion would affect the operation of segregated schools in the States. All that Negro counsel could produce in their reargument on the point in 1953, despite the desperate labors of Dr. Kelly and his associates, were some generalities, some sweeping statements of ideals, and other nebulous expressions on the part of radical abolitionists on the one hand and apprehensive States' Righters on the other. It is plain that the Stevens–Sumner group won from the Thirty-ninth Congress two compromise instruments, a statute

and a constitutional amendment, both intended to guarantee to the Negro the essential civil rights spelled out in the Freedmen's Bill and in the Civil Rights Act—to sue and be sued, to own and inherit property, and the like. "The right to go to school," as Senator Trumbull of Pennsylvania was to say in 1872 in debating the General Amnesty Act, "is not a civil right and never was."

2. Actions of the State legislatures and constitutional conventions. The proposed Fourteenth Amendment to the Constitution went out to the States on June 18, 1866. Connecticut ratified on June 30, New Hampshire on July 6, Tennessee on July 19. New Jersey and Oregon, both of whom later were to rescind their actions, ratified in September. Then came a jolt: On October 27, Texas flatly rejected the proposed amendment, by a vote of 70 to 5 in the House and 27 to 1 in the Texas Senate. Vermont ratified on October 30, but on November 1 Georgia rejected by 147–2 and 38–0 in its House and Senate. Then, in rapid succession, Arkansas, Florida, North Carolina, and South Carolina spurned the amendment. In January 1867, Virginia, Mississippi, Kentucky, and Maryland rejected. Early in February, Delaware and Louisiana turned it down also.

On March 2, 1867, an infuriated Congress enacted over Johnson's veto a law that seems incredible by any standpoint of constitutional law. This "Act to Provide for the More Efficient Government of the Rebel States" further defined the districts that had been created in the former Confederacy by earlier Reconstruction acts. Section 5 of the Act fixed two requirements for readmission of the Southern States to full standing in the Union. The first condition was that each of the States adopt a new State Constitution; the second was that, at the first legislature to be held after adoption of the new Constitution, each State must ratify the Fourteenth Amendment. Delegates to the State constitutional conventions were to be chosen by all male citizens regardless of race, except felons and those who had participated in the "rebellion." No Confederate veteran who earlier had been a member of a State legislature, or held any other office under

the government of a Southern State, could become a candidate for the new legislatures to be elected.

With that vindictive and extortionate act, military government settled upon the South and all semblance of free republican government vanished. With no alternative but to submit or remain under the sword, the Southern States accepted the amendment. Arkansas ratified in April 1868, Florida on June 9, North Carolina, South Carolina, Alabama, and Louisiana in July. Meanwhile, Ohio on January 13, 1868, had undertaken to rescind its ratification of the amendment, and New Jersey, on March 25, had done the same thing. In both States, recently the bitter foes of the South, the new amendment was denounced as unconstitutionally approved in the House of Representatives and unconstitutionally demanded of the Southern States. (It was several months later, in October 1868, that Oregon also attempted to rescind its ratification.)

On July 20, 1868, Secretary Seward issued a cautious proclamation certifying that the Fourteenth Amendment had been ratified. There were, he surmised, thirty-seven States then "in the Union." Twenty-eight, by Seward's count, had approved the amendment, but he was doubtful about the whole affair. Among his twenty-eight were Arkansas, Florida, North Carolina, Louisiana, and South Carolina, where ratification had been sanctioned by "newly constituted and newly established bodies avowing themselves to be acting as the legislatures" of these States. If their resolutions were valid, and if the original ratifications of Ohio and New Jersey were still valid, notwithstanding their subsequent withdrawals, the amendment was a part of the Constitution.

On the following day, July 21, Congress passed a joint resolution to resolve Seward's doubts. It ordered him to declare the amendment unconditionally adopted; and on July 28, adding the names of Alabama and Georgia, whose notifications had just been received, Seward declared the Fourteenth officially a part of the Constitution.

Was the Fourteenth Amendment thus legally and constitutionally added to the Constitution in 1868? It is exceedingly doubtful. Neither a resolution of the Congress nor a

proclamation of a Secretary of State can supersede the Constitution itself. If the States of Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana were "in the Union" in 1865, when their ratifications of the Thirteenth Amendment were counted among the three-fourths necessary to adoption, it is impossible to understand how they legally could have been read out of the Union by the act of March 2, 1867, put under military dictatorship, and ordered to ratify the Fourteenth Amendment under duress. If the Confederate States are eliminated from the equation altogether, a mathematical case can be made to support ratification. Twenty-five States were represented in the Thirty-ninth Congress that proposed the Fourteenth Amendment in 1866. Nebraska was admitted to the Union March 1, 1867. Three-fourths of twenty-six States (for ratification purposes) is twenty States. By the time of the proclamations and resolutions of July 1868, twenty-one States outside the South had unconditionally ratified the amendment. But the assumption on which the Congress proceeded was that there were thirty-seven States in the Union in the summer of 1868. Three-fourths of thirty-seven States (for ratification purposes) is twenty-eight States. In order to count twenty-eight States, the ratifications of the rescinding New Jersey and Ohio must be added to those of Arkansas, Florida, North Carolina, Louisiana, and South Carolina; or, in place of New Jersey and Ohio, the ratifications of Alabama and Georgia may be substituted. In any event, reliance must be placed upon the coerced ratifications of either five or seven Southern States which at that time were denied a republican government, denied representation in the Congress, and denied the right to act freely upon the proposed amendment. This is the tainted parenthood of the constitutional provision on which the Supreme Court of the United States, in the school cases, sought to be informed.

I digress. The question here is, "What evidence is there that the . . . State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?"

This is the evidence:

Among the States that ratified the Fourteenth Amendment were these twelve: Connecticut, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, Oregon, Rhode Island, Vermont, and Wisconsin. There is not a scrap of evidence to suggest that the issue of school segregation ever was considered in any of them. Rhode Island, Connecticut, and Michigan were the only States in this group with as much as 2 per cent Negro population in 1870 (Rhode Island had 5000 Negroes out of 217,000; Connecticut had 9668 Negroes in a population of 537,000; Michigan a Negro population of 11,849 in a total of 1,184,000.) The rest ranged down to the 346 Negroes then resident in Oregon and the 789 then resident in Nebraska. School segregation simply was no problem in these States in 1866. The question never was discussed.

Two other States that ratified the Fourteenth Amendment were Florida and Louisiana. Both houses of Florida's legislature, when they were in a position to act freely, rejected the amendment unanimously. This was in December 1866. The following March came the Reconstruction Act, and in the course of time came a State constitutional convention set up by military decree. It was comprised of eighteen Negroes and twenty-seven Carpetbaggers and Scalawags. On June 9, 1868, the Governor of Florida dispatched to a similarly chosen legislature a message recommending "that no action be taken save that dictated by the acts of Congress as conditions precedent to admission, to wit: The passage of the proposed amendment to the Constitution, known as the Fourteenth Article. . . ." The Florida legislature submissively ratified the amendment, 23–6 in the House, 10–3 in the Senate. Public schools were set up, with no statutory or constitutional provision to prevent their joint use by both races; but the evidence is persuasive that no integration ever occurred in this period, and in 1885, when an end to Reconstruction permitted Florida to follow the separate-but-equal pattern which by then had been solidly established elsewhere, the Florida Constitution was amended to provide that "white and colored children shall not be taught in the same school, but impartial

provision shall be made for both." Certainly Florida did not understand that the amendment, of and by itself, prohibited the States from requiring racial separation in the schools.

The situation in Louisiana was more chaotic still. The Louisiana legislature unanimously rejected the amendment in February 1867. Reconstruction followed. A constitutional convention was created, composed of forty-nine Negroes and forty-nine Carpetbaggers and Scalawags; it wrote a provision into the Louisiana Constitution that "all children . . . shall be admitted to the public schools in common, without distinction of race, color, or previous condition. There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana." But this language in a coerced State Constitution was ignored by the people. In 1870, the Superintendent of Public Instruction was to complain that the constitutional provision "excites a determined opposition on the part of many who would otherwise cooperate in the opening of schools and in the raising of funds for their support." As the years passed, Louisiana established a system of racially separate public schools, in accordance with the demonstrable understanding of the Fourteenth Amendment elsewhere in the Union, and a freely chosen constitutional convention in 1898 made segregation mandatory.

Florida and Louisiana have been here singled out, because the confused record in the two States offers the best opportunity—indeed, the only opportunity—for a case to be made that *any* of the States ever understood or contemplated that the Fourteenth Amendment might in any fashion serve to prohibit the operation of racially separate schools. If evidence cannot be adduced here, it cannot be adduced anywhere. And this poor, scanty record of actions taken under duress —and later repudiated under freedom—is the best that hard-laboring historians can produce.

What of the other States? In twenty-three other States, positive evidence is available that neither the State conventions nor the State legislatures at any time ever understood or contemplated that the Fourteenth Amendment prohibited them from establishing racially separate schools.

Look at the record, *first in terms of States outside the South:*

California took no action on the Fourteenth Amendment, but it established racially separate schools by statute in 1870, two years after the amendment had been ratified.

Delaware refused to ratify the amendment, and made no provision for Negro education of any sort until 1881. Then separate Negro schools were established, and Delaware's constitution of 1897 made segregation mandatory. How can it be contended that Delaware understood the Fourteenth Amendment to prohibit separate schools?

Illinois refused to admit Negroes to any schools at the time of its ratification of the Fourteenth Amendment. It was not until five years later that a general school law admitted them to educational facilities—some segregated, others integrated. Segregated schools persisted at least until 1884, when the Supreme Court of Illinois acknowledged the operation of segregated institutions, and ruled them in violation of a State law that had been passed in the interim. But no court or legislature in Illinois ever asserted that such schools were in violation of the Fourteenth Amendment.

Indiana ratified the Fourteenth Amendment in June 1867, following a message from Governor Morton specifically advocating "the establishment of separate schools," because "I could not recommend that white and colored children be placed together in the same schools." And it was not until 1949—eighty-one years after adoption of the Fourteenth Amendment—that Indiana formally abandoned segregation in its schools.

New Jersey was another Northern State in which racially separate schools were continued long after adoption of the Fourteenth Amendment. It was not until 1881 that the legislature prohibited their operation, but when this statute was construed three years later, no mention of any sort was made of the Fourteenth Amendment.

New York. What of New York? The State ratified the Fourteenth in January 1867, and later the same year convened a constitutional convention at which a ringing declaration was adopted in favor of civil rights—but there was not

a word in this declaration in support of racially integrated schools. On the contrary, separate schools were specifically permitted in New York until 1900—thirty-two years after the Fourteenth Amendment became part of the Constitution. Can it be seriously contended that New York understood or contemplated that the amendment in and of itself would abolish school segregation?

To bring these Northern examples to an end, consider Ohio, Pennsylvania, and West Virginia. *Ohio* had racially separate schools at the time it ratified in 1867; such schools specifically were continued by a statute of 1874, and the system was not discarded by State law until 1887. *Pennsylvania* also had a system of segregated schools at the time of its ratification in 1867; the legislature continued the system by statute in 1869; the system was not abolished until 1881. *West Virginia's* legislature ratified the Fourteenth on January 16, 1867. On February 27, precisely six weeks later, the same legislature adopted a statute providing that "white and colored persons shall not be taught in the same schools." What is one to say of West Virginia's understanding of the meaning of the Fourteenth Amendment?

Action of the Southern States was entirely in accord with the understanding thus demonstrated by their recent enemies in the North. To summarize these briefly:

Alabama ratified under coercion on July 13, 1868; but less than a month later, on August 11, 1868, the same legislature—even though it was dominated by Negroes and Carpetbaggers—enacted a law prohibiting mixed schools "unless it be by the unanimous consent of the parents and guardians of such children."

Arkansas ratified on April 6, 1868. The same military legislature on July 23, 1868, passed a statute directing the State Board of Education to "make the necessary provisions for establishing separate schools for white and colored children."

Georgia ratified twice, once in 1868 and again in 1870. The latter legislature still was under Reconstruction rule; a majority of both houses were Republicans. But even this legislature, immediately after its renewed ratification of 1870, adopted a school act providing that "the children of the

white and colored races shall not be taught together in any sub-district of the State."

Kentucky, not subject to military reconstruction, rejected the Fourteenth in January 1867. The same legislature provided for racially separate schools, and the State's constitution of 1891 required them.

Mississippi's legislature, dominated by Republicans and Negroes, ratified the Amendment in 1870 and simultaneously provided for a public school system. It was a segregated system, though the law did not require this specifically. Segregation was made mandatory in the schools in 1878.

North Carolina ratified in July 1868. The following winter saw enactment of a statute directing local school authorities to establish "separate schools for the instruction of children and youth of each race."

South Carolina's Reconstruction constitutional convention (seventy-six Negroes, forty-eight Carpetbaggers) directed the forthcoming State legislature to establish a public school system free to all children "without regard to race or color," but the Reconstruction legislature (only twenty-two of its 155 members could read or write) paid no attention to the provision. The Governor was a brevet brigadier general from Maine, Robert K. Scott. In his Inaugural Address he told the assembled illiterate Negroes and white legislators quite frankly that he deemed racial separation in the schools "of the greatest importance to all classes of our people." Listen to what this Union Governor of South Carolina said, on the very day after the South Carolina legislature had ratified the Fourteenth Amendment:

> While the moralist and philanthropist cheerfully recognizes the fact that "God hath made of one blood all nations of men" yet the statesman in legislating for a political society that embraces two distinct, and in some measure, antagonistic races, in the great body of its electors, must, as far as the law of equal rights will permit, take cognizance of existing prejudices among both. In school districts, where the white children may be preponderate in numbers, the colored children may be oppressed, or partially excluded from the schools, while the same result may accrue to the whites, in those districts

> where colored children are in the majority, *unless they shall be separated by law as herein recommended.* [Emphasis *supplied.*]

South Carolina's legislature adopted Governor Scott's recommendation. A Massachusetts Negro became State Superintendent of Public Instruction; and he presided over the establishment of a system of segregated schools.

A reconstructed legislature in *Texas* ratified the Fourteenth Amendment in February 1870. The same legislature provided for public schools to be operated by trustees who "may make any separation of the students or schools necessary to insure success." Segregated schools were made mandatory in Texas by the Constitution of 1876.

Finally, *Virginia.* The Old Dominion's first legislature under the Reconstruction Constitution of 1869 ratified the Fourteenth and Fifteenth Amendments to the Federal Constitution, and then adjourned until the State's representatives were readmitted to Congress. Then the same legislature reconvened and promptly enacted a statute providing for a system of free schools under a requirement that "white and colored persons shall not be taught in the same schools, but in separate schools."

What does all this add up to? Simply this: There were thirty-seven States whose "understandings" and "contemplations" of the Fourteenth Amendment at the time of its ratification must be sought. In fourteen of these States (twelve non-Southern States plus Florida and Louisiana), no substantial evidence can be adduced one way or another. In twenty-three of these States (fourteen non-Southern States and nine Southern States), positive evidence exists to show that ratification of the Fourteenth Amendment was *never* thought to prohibit the operation of racially separate schools. The very legislative bodies that ratified the amendment simultaneously provided for separate schools. In not a single one of the thirty seven States is there any substantial evidence—or even any flimsy evidence—to show affirmatively that the legislatures that considered the Fourteenth Amendment believed, understood, or contemplated that the amendment in and of itself, would prohibit school segregation.

3. Decisions of State and Federal courts in the period immediately following adoption of the amendment. Confronting this overwhelming evidence, counsel for the Negro plaintiffs desperately attempted to establish what might be called a conspiracy theory, so far as the Southern States were concerned: These States, it was suggested, knew all along that the Fourteenth Amendment was intended to prohibit them from maintaining separate schools, but they conspired to deceive the rest of the nation until they were formally readmitted to the Union and Reconstruction had ended. This theory does not justify even the contempt with which defense counsel brushed it aside. The plain and visible fact is that racially separate schools were everywhere recognized and accepted as fully in compliance with the new constitutional provisions. It is not necessary to seek evidence of this recognition in Southern States alone, nor to rely upon the interpretation that "politicians" may have put upon the amendment here and there. Let us turn from Congress and the State legislatures, and see what the courts said about the meaning of the Fourteenth Amendment in the years immediately following its ratification in 1868.

The clock should be turned back first to 1849, nineteen years before the ratification of the amendment, when Sarah C. Roberts, a five-year-old Negro girl, brought suit against the City of Boston (59 Mass. 198) in the Supreme Judicial Court of Massachusetts. Boston then had two primary schools exclusively for Negroes, one on Belknap Street, in the Eighth School District, the other on Sun Court Street, in the Second. Negroes made up one sixty-second of Boston's population, but among this one sixty-second was Sarah Roberts, a resident of the Sixth District on Andover Street. She wanted to attend the white school nearest her. Charles Sumner and R. Morris, Jr., brought suit in her behalf, contending as many others were to contend in subsequent years that Sarah had a right to attend her neighborhood school, and that Boston had no right to make classification by race. The suit came on to be heard before Chief Justice Lemuel Shaw and others. This, to repeat, was many years prior to the Fourteenth Amendment, but the question put to the court was to be the question argued many times

thereafter: What are the "privileges" of the individual citizens? Where do the powers of the state end in terms of a racial classification for schoolchildren? This is Boston, 1849:

> The great principle, advanced by the learned and eloquent advocate of the plaintiff, is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our constitution of free government. But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment, but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on the laws adapted to their respective relations and conditions.
>
> Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and social, the question then arises, whether the regulation in question, which provides separate schools for colored children, is a violation of any of these rights.

The Massachusetts court faced the issue squarely, and concluded that separate schools did no violence to any civil right or privilege held by the colored children. The court's inquiry was directed toward a single point: Was this a reasonable classification? Had the school trustees abused their responsibility? After great deliberation, the trustees had concluded that the good of both white and colored children would be promoted by separate primary schools. Said the court: "We can perceive no ground to doubt that this is the honest result of their experience and judgment." It was urged that such

separation tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. Said the Massachusetts court:

> This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence. . . .

The Massachusetts court refused to say that the trustees' decision in behalf of racially separate schools was capricious or arbitrary; such a decision was within their realistic prerogatives, and it denied no child his "civil rights." The court spoke long before the Civil War, long before there was a Fourteenth Amendment; but the universal understanding of the framers of the Fourteenth Amendment was that the amendment neither created nor secured any "new" rights of citizens of the United States—it merely defined and secured, for the emancipated Negro, the civil rights enjoyed by white citizens all along. Serious students of the subject may wish to confirm this from *II Am. Jur. Const. Laws* (Sect. 255, pages 987–97). The Massachusetts opinion has great weight in establishing, as the formal expression of an abolitionist Northern State, that "civil rights" did not include any right to attend racially integrated schools. If this is of merely academic importance today, the court's opinion in *Roberts* v. *Boston* is significant in determining what the framers and adopters of the Fourteenth Amendment in 1866 understood the amendment to mean. They did not mean that it would afford the Negro citizen any more identity of access to public facilities than the Massachusetts court was willing to agree to in 1849.

Now, let us leap ahead. The Fourteenth Amendment was proposed in 1866 and declared ratified in 1868; throughout this period, such radical abolitionists as Sumner and Seward

were crying for a broad interpretation of the amendment. In Ohio, during the December term of the State Supreme Court in 1871, a suit came on to be heard from William Garnes against John W. McCann and other members of the school board in Franklin County. *This is Ohio.* Its Senators Wade and Sherman cast their votes in the thirty-ninth Congress in favor of the amendment. The State court surely was familiar with their views. Garnes' complaint was that under State laws of 1853 and 1864 his three children had been denied admission to schools in nearby Norwich; instead, his children were required to attend a Negro school in Hilliard. He brought suit, based entirely on the Fourteenth Amendment, contending that the amendment prohibited Ohio from adopting any school law that permitted or required segregation. His was the first direct test of the intention of the framers and adopters.

The Ohio court (21 Ohio State 198) gave the petitioner's argument scant attention. On the theory that Garnes, as a citizen of the United States, might have been denied certain privileges and immunities, the court observed briefly that the amendment went only to "such privileges or immunities as are derived from, or recognized by, the Constitution of the United States." Any broader construction would open a field of limitless conjecture "and might work such limitations of the power of the States to manage and regulate their local institutions and affairs *as were never contemplated by the Amendment.*" [Emphasis added.]

No such construction ever had been intended. The privileges and immunities of a school system "are derived solely from the constitution and laws of the State." If Ohio were to abolish all public schools, it scarcely could be claimed that a "citizen of the United States" could compel Ohio to re-establish them. This being so, Garnes could demand no more than equal protection under the laws of Ohio. And this had not been denied him. His children were assured their "equal proportion of the school fund." (The court's assertion on this score is important to establish the point that the doctrine of "separate but equal" arose at the very outset of litigation on school segregation.) This was all Garnes was entitled to demand. "A classification of the

youth of the State for school purposes, upon any basis which does not exclude either class from equal school advantages, is no infringement of the equal rights of citizens secured by the constitution of the State." And the Fourteenth Amendment, at most, affords colored citizens only an additional guaranty of rights already secured to them by the State Constitution.

In brief, the plaintiff Garnes could not validly complain that the privileges of his children were abridged, or that equal protection of the law had been denied them. "Equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school." And the court added:

> Any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either. There is, then, no ground upon which the plaintiff can claim that his rights under the Fourteenth Amendment have been infringed.

This view of the Fourteenth Amendment, stated by the Supreme Court of Ohio in 1871, was accepted the following year by the United States Circuit Court for the Southern District of Ohio. In *United States* v. *Buntin* (10 Fed. 730), Circuit Judge Baxter summarized the *Garnes* case as a holding that segregation is "within the constitutional discretion of the legislature, and that the separate education of the whites and blacks . . . is no wrong to either." Said the Federal Circuit Court in Ohio: "I concur in and adopt this decision as a correct exposition of the Constitution."

The same question twice presented in Ohio cropped up again in 1872 in Nevada. Surely Nevada was no Southern State, nor could the views of its State Supreme Court have been tainted by any Confederate conspiracy. Both of Nevada's Senators, Nye and Stewart, had voted in 1866 in favor of the amendment. But in *Stoutmeyer* v. *Duffy* (7 Nev. 342), the State court found nothing whatever in the Fourteenth Amendment to compel the admission of a seven-year-old

Negro boy to the white schools of Ormsby County. His denial was a violation of State law, said the court, but not of Federal law. A concurring justice thought it "utterly untenable" that segregated schools, as such, should be held a violation of the Fourteenth Amendment.

In January 1874, the same question arose in California. It cannot be suggested seriously that the Supreme Court of California in *Ward* v. *Flood* (48 Calif. 36) was then acting in some joint conspiracy with the invidious Alabamans. Young Mary Frances Ward demanded admission to the white Broadway Grammar School in San Francisco; Principal Noah F. Flood, acting under State law, declined. Was his action a violation of the Fourteenth Amendment? Plainly not, said the California court. In the mere fact that the races are separated in the public schools "there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense."

Eleven months later, in November 1874, the same question came up in Indiana. Who would regard Indiana as a Southern State? The case was *Cory* v. *Carter* (48 Ind. 327). Here a Negro resident of Lawrence township in Marion County demanded admission of his grandchildren to the nearest local schools. An act of Indiana in May 1869, nearly a year after ratification of the Fourteenth Amendment, required their education at nearby Negro schools. Was the State act, as the petitioner complained, in violation of the new amendment to the Constitution? Not at all, said the Supreme Court of Indiana. The new Fourteenth Amendment was not intended to prohibit to the State the power of operating separate schools for white and Negro children. This was a question of "domestic policy," to be settled by State law:

> In other words, the placing of the white children of the State in one class and the Negro children of the State in another class and requiring these classes to be taught separately, provision being made for their educa-

> tion in the same branches, with capable teachers, and to the extent of their pro rata share in the school revenue, does not amount to a denial of equal privileges to either, or conflict with the open character of the system required by the Constitution. The system would be equally open to all. The tuition would be free. The privileges of the schools would be denied to none. The white children go to one school, or to certain of the schools in the system of common schools. The colored children go to another school, or to certain others of the schools in the system of common schools. . . . If there be cause of complaint, the white class has as much, if not greater cause than the colored class, for the latter class receive their full share of the school revenue, although none of it may have been contributed by such class. . . .

And in a telling section of its opinion, the Indiana court went on to make the point that Congress itself had fixed the spirit and meaning of the Fourteenth Amendment by adopting legislation requiring racially segregated schools in the District of Columbia. The court called attention to the dates of such legislation: July 23, 1866; July 28, 1866; March 3, 1873. These acts of Congress were contemporaneous with adoption of the Fourteenth Amendment. It seemed to the Indiana court unthinkable that the Congress should have fixed some standard for the States less than that required of the central government, and surely Congress itself, having framed the amendment, knew what was intended by the amendment: "This legislation of Congress continues in force. . . as a legislative construction of the Fourteenth Amendment, and as a legislative declaration of what was thought to be lawful, proper, and expedient under such amendment, by the same body that proposed such amendment to the States for their approval and ratification."

Now, to maintain the chronology, consider one case from a Southern State: *Arnold Bertonneau* v. *Board of Directors of* [New Orleans] *City Schools* (3 Woods 177, 3 Fed. Cases 294, Case No. 1,361). This was decided by a Federal Circuit Court of Appeals in November 1878. The Fourteenth Amendment was then ten years old. The ques-

tion, brought by the Negro father of two boys, seven and nine years old, was whether under the Fourteenth Amendment they were entitled to admission to a white school three blocks from their home on Rampart Street. A Negro school was also conveniently available. The Reconstruction Constitution of Louisiana then carried the provision, earlier quoted, that no separate schools should be established for any race under State law. But the Federal court had no concern for the State Constitution. Its sole concern was with the United States Constitution, and Circuit Judge William B. Woods found no violation of it in the schools of the Vieux Carré. Woods, incidentally, was an Ohioan; he had been a general in the Union Army; in 1880 he was to be named by Hayes to the U.S. Supreme Court. Here he said:

> Both races are treated precisely alike. White children and colored children are compelled to attend different schools. That is all. . . . Any classification which preserves substantially equal school advantage does not impair any rights, and is not prohibited by the Constitution of the United States. Equality of right does not necessarily imply identity of right.

One of the most frequently quoted court cases of this period arose in New York in 1883 (*People, ex. rel. King* v. *Gallagher,* 93 N. Y. 438). It involved a mandamus petition brought by a twelve-year-old Negro girl in Brooklyn to compel a local school principal, Gallagher, to admit her to his school despite a State law of 1864 permitting Brooklyn to maintain racially separate schools. Her suit was based squarely upon the Fourteenth Amendment. The Court of Appeals of New York wrote a long and serious opinion in dismissing her petition as groundless. The history of the amendment, said the court, "is familiar to all." (The statement bears special emphasis: One of New York's Senators at the time of the court's opinion was Roscoe Conkling, a leading lawyer and abolitionist who had been tendered the office of Chief Justice. New York's two Senators at the time the amendment was submitted in 1866, Harris and Morgan,

both had supported the resolution. When the court said the history of the Fourteenth was "familiar to all," it doubtless had in mind the opinions and interpretations of the State's own Senators.) In the view of the court, the object of the amendment was to secure for the Negro people civil rights equal to those enjoyed by white persons. But the Negroes were not to have any greater or more extensive civil rights than others. As citizens of the United States, their "privileges and immunities" were to be identically protected. As citizens of the individual States, they were to have whatever equal State rights might be defined in those States—and the privilege of receiving an education at the expense of the State, being created and conferred solely by the law of the State and subject to its discretionary regulation, was a privilege plainly within the regulation of the State. So far as "privileges and immunities" were concerned, the plaintiff had nothing to complain about. But the court went on to add some thoughtful comments on the general subject of equal protection, and these merit a careful reading.

> But we are of the opinion that our decision can also be sustained upon another ground, and one which will be equally satisfactory as affording a practical solution of the questions involved. It is believed that this provision will be given its full scope and effect when it is so construed as to secure to all citizens, wherever domiciled, equal protection under the laws and the enjoyment of those privileges which belong, as of right, to each individual citizen. This right, as affected by the questions in this case in its fullest sense, is the privilege of obtaining an education under the same advantages and with equal facilities for its acquisition with those enjoyed by any other individual. It is not believed that these provisions were intended to regulate or interfere with the social standing or privileges of the citizen, or to have any other effect than to give to all, without respect to color, age or sex, the same legal rights and the uniform protection of the same laws.
>
> In the nature of things there must be many social distinctions and privileges remaining unregulated by law

and left within the control of the individual citizens, as being beyond the reach of the legislative functions of government to organize or control. The attempt to enforce social intimacy and intercourse between the races, by legal enactments, would probably tend only to embitter them, and produce an evil instead of a good result. [Citing *Roberts* v. *City of Boston.*]

As to whether such intercourse shall ever occur must eventually depend upon the operation of natural laws and the merits of individuals, and can exist and be enjoyed only by the voluntary consent of the persons between whom such relations may arise, but this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized and performed all of the functions respecting social advantages with which it is endowed.

The New York court went on to analyze the "startling results" that would follow from the assertion that racial separation was intended to be prohibited by the Fourteenth Amendment. The same line of argument would prohibit classifications by sex or age, and surely this was not intended. No. Plainly, said the court, the Brooklyn school authorities had the power, "in the best interests of education, to cause different races and nationalities, whose requirements are manifestly different, to be educated in separate places." The court added:

We cannot see why the establishment of separate institutions for the education and benefit of different races should be held any more to imply the inferiority of one race than that of the other, and no ground for such an implication exists in the act of discrimination itself. If it could be shown that the accommodations afforded to one race were inferior to those enjoyed by another, some advance might be made in the argument, but until that

is established, no basis is laid for a claim that the privileges of the respective races are not equal. . . .

A natural distinction exists between those races which was not created, neither can it be abrogated, by law, and legislation which recognizes this distinction and provides for the peculiar wants or conditions of the particular race can in no just sense be called a discrimination against such race or an abridgment of its civil rights. The implication that the Congress of 1866, and the New York State legislature of the same year, sitting during the very throes of our civil war, who were respectively the authors of legislation providing for the separate education of the two races, were thereby guilty of unfriendly discrimination against the colored race, will be received with surprise by most people and with conviction by none. . . .

And the New York court went on to make the same point earlier made in Indiana, that "the highest authority for the interpretation of this amendment is afforded by the action of those sessions of Congress which not only immediately preceded, but were also contemporaneous with, the adoption of the amendment in question." If Congress could establish schools exclusively for Negroes, as it repeatedly had done, no good reason could be suggested why a greater restriction should apply to the States. "If regard be had to that established rule for the construction of statutes and constitutional enactments which require courts, in giving them effect, to regard the intent of the law-making power, it is difficult to see why the considerations suggested are not controlling upon the question under discussion."

That was New York speaking, only fifteen years after ratification of the amendment, in 1883. Did *King* v. *Gallagher* say nothing at all, in 1954, to the Supreme Court of the United States? Was this opinion not directly responsive to the court's question of whether the States understood or contemplated that the Fourteenth Amendment was intended to prohibit separate schools?

To complete the record of school decisions directly in point, prior to the Supreme Court's opinion of 1896 in

Plessy v. *Ferguson*, one final case should be mentioned. This was *Lehew* v. *Brummell* (15 S.W. 765), decided by the Supreme Court of Missouri in March 1891. Both the Missouri Constitution and a State act of 1887 then required racially separate schools. Five Negro children of Grundy County attacked the requirement as violative of both the "privileges and immunities" and "equal protection" provisions of the Fourteenth Amendment. The Missouri court rejected both contentions. "The right of children to attend the public schools, and of parents to send their children to them, is not a privilege or immunity belonging to a citizen of the United States as such. It is a right created by the State, and a right belonging to citizens of the State as such." On the second point, separation of pupils by race was not an unreasonable or arbitrary classification, for

> color carries with it natural race peculiarities, which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social relations, recognized by all well-ordered governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage. . . . The fact that the two races are separated for the purpose of receiving instruction deprives neither of any rights. It is a reasonable regulation of the exercise of the right.

Mention of the *Lehew* case in Missouri brings this chronology of judicial pronouncements on racially separate schools to the Supreme Court's famous statement in *Plessy*. With that landmark in sight, the citizen seeking to learn what the framers intended the Fourteenth Amendment to accomplish should pause to read two other monumental Supreme Court opinions—the *Slaughter-House Cases* of 1873 (16 Wallace 36) and the *Civil Rights Cases* of 1883 (109 U. S. 3). They do not deal directly with a State's

power to operate racially separate public schools, but they do speak eloquently of the whole meaning of the Reconstruction amendments as that meaning was understood by those closest to it.

In the *Slaughter-House Cases*, the court dealt with an act of Louisiana creating a single company to have exclusive responsibility for meat-processing in New Orleans. The law was intended to promote health and sanitation (or so the State insisted), but local butchers attacked it as an invasion of their rights under the Fourteenth Amendment. The Supreme Court would not agree. No right to be a butcher in Louisiana inured to a "citizen of the United States" prior to adoption of the Amendment, and the amendment gave him none. Such rights, privileges, and immunities remained within the jurisdiction of the States after 1868, as surely as they had rested with the States before 1868. In terms of the basic structure of the Union, the War of 1861–65 had changed nothing. The Fourteenth Amendment, though it laid certain prohibitions upon the States and vested in the Congress power to enforce those prohibitions by appropriate legislation, never had been intended "to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States." Any such interpretation would radically change "the whole theory of the relations of the State and Federal governments to each other, and of both these governments to the people." No such results, said the court, *"were intended by the Congress which proposed these amendments, nor by the legislatures which ratified them."* The Fourteenth Amendment had then been in effect only five years. Every member of the court was familiar with the circumstances surrounding its submission and ratification.

On March 1, 1875, Congress enacted a truly sweeping Civil Rights Act. The first section asserted, affirmatively, that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of . . . inns, public conveyances on land or water, theatres, and other like places of amusement." Five cases testing the law came together before the Supreme Court for decision in October 1883. Harlan alone dissented from an opinion of the court

declaring that the act went beyond the boundaries of the power vested in the Congress by the fifth section of the Fourteenth Amendment. What was this power? In the view of the majority, it boiled down simply to this—a power to enforce. To enforce what? To enforce the prohibitions laid upon the States—that is, to adopt "corrective legislation such as may be necessary and proper for counteracting such laws as the States may adopt or enforce and which, *by the amendment,* they are prohibited from making or enforcing." [Emphasis added.] The Civil Rights Act did not vest in the Congress any power to adopt general legislation dealing with the rights of the citizens, or to establish any code of municipal law. Any such assumption, said the court, "is certainly unsound." The intention of the Fourteenth Amendment was to prohibit the States from denying to any person "those fundamental rights which are the essence of civil freedom, namely, the right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property." Whenever a State attempted by its own action to deny a Negro such rights as these, a State would be in violation of the Constitution; but until a State transgressed upon some right *secured by the amendment,* a State could do as it wished. Was a right to attend an integrated public school such a right? The *Civil Rights Cases* do not suggest it for a moment. On the contrary, the construction placed upon the Fourteenth Amendment by the court suggests precisely the opposite.

Whatever doubts might have been lingering in any quarter were put at rest by the Supreme Court's opinion of May 1896 in *Plessy* v. *Ferguson.* The Fourteenth Amendment had been in operation nearly twenty-eight years. Plessy, one-eighth Negro, challenged a Louisiana State law requiring separate facilities for whites and Negroes on railway lines; his principal contention was that he was thereby denied equal protection of the laws. With only Harlan dissenting (Brewer did not participate), the Supreme Court expounded in clear and simple terms the "understanding" and "contemplation" of the Fourteenth Amendment:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have generally, if not universally, been recognized as within the competency of the State legislatures in the exercise of their police power. *The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.* [Emphasis supplied.]

What was the primary question the United States Supreme Court asked in the *Brown* case in June 1953? This was the question: Whether the Congress that submitted the Fourteenth Amendment, and the States that ratified it, understood or contemplated that the amendment was intended to abolish segregation in public schools.

We have seen that the Congress surely did not understand or contemplate this: The Congress itself provided for racially separate schools in the District of Columbia. Over a long period of years following adoption of the amendment, States both North and South continued to operate separate schools, without protest or interference of any sort from Congress.

Just as plainly, the States that ratified the amendment did not understand or contemplate that it was intended to abolish segregation in schools: One after another, they provided for racially separate schools in the same breath with which they ratified the amendment.

And if one seeks in the judicial pronouncements of the day for independent evidence of what the Congress and the States understood and contemplated the amendment to

mean the evidence is overwhelming: The power of the States to maintain separate schools was "generally, if not universally" held to be completely in accord with the Fourteenth Amendment. The seven justices who united in *Plessy* were all mature men at the time the amendment became effective in 1868. Edward D. White of Louisiana, the youngest, was then twenty-three, Brown of Michigan was thirty-two, Fuller of Illinois thirty-five, Field of California fifty-two, Gray of Massachusetts forty, Shiras of Pennsylvania, thirty-six, and Peckham of New York thirty. From a standpoint of constitutional law, who could have known the understanding and contemplation of the amendment better than they? They grew up with it. And in 1896, when they handed down the *Plessy* opinion, they were men of fifty-one to eighty, in a position to look back maturely upon twenty-eight years of political life under the Fourteenth Amendment.

The other two questions of a general nature posed by the Supreme Court in June 1953 may be dealt with more briefly. Much of the ground has been covered already. These were:

Question 2: If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the amendment

(a) that future Congresses might, in the exercise of their power under Section 5 of the amendment, abolish such segregation, or

(b) that it would be within the judicial power, in the light of future conditions, to construe the amendment as abolishing such segregation of its own force?

Question 3: On the assumption that the answers to Questions 2 (a) and (b) do not dispose of the issue, is it within the judicial power, in construing the amendment, to abolish segregation in public schools?

Question 2 (a) may best be answered by studying the Fourteenth Amendment in terms of political power. What is the Fourteenth? Obviously, it is first of all a prohibition upon the States. It is not primarily a grant of power to the Congress. Its thrust is negative: The States shall not make; the States shall not enforce; the States shall not abridge; the States shall not deprive; the States shall not deny. Section 3 carries an incidental delegation of power to the Congress, authorizing the removal of political disabilities imposed upon Confederate soldiers, and Section 5 vests in the Congress a power "to enforce, by appropriate legislation, the provisions of this article."

Would an act of Congress prohibiting the States from maintaining racially separate schools be "appropriate legislation, enforcing the provisions of this article"? The framers of the Fourteenth Amendment did not think so. They did not regard the right to attend a particular school as a "civil right." Well after the amendment became operative, Sumner and other abolitionist leaders in the Congress several times introduced legislation having this end; twice they got such a bill through the Senate (1872 and 1874), on tie votes broken by the Vice-President, but they were never able to get a bill through the House. And in the Civil Rights Act of 1875, an effort to prohibit racially separate schools was defeated decisively.

The power vested in Congress in the fifth section is no general grant of power. It is limited to legislation appropriate to enforcing the provisions "of this article." And until it can be shown that one of the provisions "of this article" was intended to prohibit to the States the power to maintain racially separate schools, it cannot be shown that Congress appropriately could enact legislation having that end.

No provision of the Fourteenth Amendment imposes such a prohibition on the States. Therefore, no act of the Congress validly could seek to enforce such a prohibition.

And surely it is all the more evident, to get at Questions 2 (b) and 3, that nothing in the Fourteenth Amendment, or in any other provision of the Constitution or act of Congress, ever was intended to give the Supreme Court the power to abolish segregation in public schools by its own fiat. If the

power to accomplish this end rested in Federal authority at all, it rested in the hands of the Congress. The court might decide whether an act of the Congress prohibiting such schools in the States were "appropriate legislation" to enforce provisions of the Fourteenth Amendment, but the court has no legislative authority of any sort. As the court itself said in the *Slaughter House Cases,* the amendment was not intended to make the court "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment."

Question 3, it will be noticed, goes beyond Question 2 (b). In Question 2 (b), the court was still concerned with the intention of the framers of the Fourteenth Amendment: Did the framers understand in 1866 that some day the court, in the light of future conditions, could construe the amendment to abolish school segregation of its own force? But in Question 3, the framers are abandoned: Is it within the judicial power *today,* the court inquired, without regard to history, for the court itself to abolish school segregation by placing a new construction on the amendment?

In the brief they filed in response to the court's inquiries, attorneys for the Southern States said this:

> Certainly judicial power exists if the only question be whether this court is empowered to make an enforceable decision. But to interpret the Fourteenth Amendment as authority for the judicial abolition of school segregation would be an invasion of the legislative power and an exact reversal of the intent of the framers of the amendment.

Yes, the court has power. Hughes' cynical remark contains grim truth: Judges are restrained only by the Constitution, and the Constitution is what the judges say it is. But if the ethical tradition of our society teaches us one thing (wholly apart from the judicial tradition), it is that might and right ought always to be carefully distinguished. And on no nine men in the world does this responsibility rest more heavily than on the nine members of the court. Defense counsel in

the school cases quoted Mr. Justice Cardozo: "Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law."

Judges are not supposed to violate the law, to constitute themselves a super-legislature, to plunge beyond the bounds of the Constitution itself. And no body of critics has said this more frequently than the judges themselves.

In the famous case of *United States* v. *Butler,* (297 U. S. 1), holding that the Agricultural Adjustment Act of 1935 exceeded the power vested in the Congress to regulate commerce, the Supreme Court divided violently—but both the majority and the minority, in their discussions of judicial power and responsibility, made the same points. "The only power the court has," said the majority, "if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends." Harlan Stone, in the magnificent dissent in which Brandeis and Cardozo joined, expressed the responsibility of the court in this fashion:

> The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books, appeal lies not to the courts but to the ballot and to the processes of democratic government.

Did the Supreme Court, in the *School Segregation Cases,* have the power to abolish segregation by placing its own

contemporary construction on the Fourteenth Amendment? By casting aside Stone's "sense of self-restraint," and by substituting their own notions of what was right for the plain history of what was constitutional, the judges could assume that naked power. In the end, that was what they did—in violation of precepts they themselves had pronounced eloquently in other cases.

Mr. Justice Black, for example, was solidly on the side of judicial tradition in 1946, in *Morgan* v. *Virginia* (328 U. S. 373). The question was whether a Virginia law, requiring separate seats for white and colored passengers on buses, placed an unconstitutional burden on interstate commerce. A majority of the court thought it did, but Black, though he agreed entirely with the result of the majority's ruling, protested strongly that the power to regulate commerce was a power vested in the Congress and not in the courts. Yet in a series of cases, the court had nullified State laws just as it was nullifying Virginia's enactment in the *Morgan* case. "I thought then, and still believe," said Black, "that in these cases the court was assuming the role of a 'super-legislature' in determining matters of governmental policy." Where was Mr. Justice Black in May 1954?

Mr. Justice Frankfurter has expounded many times upon the obligation upon the court never to exceed its judicial powers. The question in *Board of Education* v. *Barnette* (319 U. S. 634), was whether West Virginia could compel its public school children to salute the flag. Five times, the Supreme Court had held that such a requirement was not in violation of the Constitution. Now, in 1943, with the shift of two justices, the holding was reversed. Frankfurter's eloquent dissent provides a moving statement of the philosophy by which judges should be guided in contemplating their judicial power:

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant, I should wholeheartedly associate myself with the general libertarian views in the court's opinion, representing as they do the thought and action of

a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. . . . It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law.

Much as he detested the West Virginia statute, Frankfurter found it impossible to deny that reasonable legislators could have passed the flag-salute law. He was guided to this conclusion by "the light of all the circumstances" and by "the history of this question in this court." Thirteen Justices of the Supreme Court in other years had found such laws within the constitutional authority of the States. In view of this "impressive judicial sanction," how could the power be now prohibited to the States? In the past, said Frankfurter:

this court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called "the spirit of the Constitution." Such undefined destructive power was not conferred on this court by the Constitution. Before a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution. Equally inadmissible is the claim to strike down legislation because to us as individuals it seems opposed to the "plan and purpose" of the Constitution. That is too tempting a basis for finding in one's personal views the purposes of the Founders.

The uncontrollable power wielded by this court brings it very close to the most sensitive areas of public affairs.

> As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern.

What had become of these views on the part of Mr. Justice Frankfurter in May 1954? By that time, not merely thirteen Justices, but more than thirty members of the court over a period of fifty-eight years had upheld the constitutionality of racially separate schools. More impressive judicial sanction scarcely could be imagined. And what is to be said of an opinion, in a highly sensitive area of public affairs, not even rationalized by "the spirit of the Constitution" or the "plan and purpose" of the Constitution, but rather by "the effect of segregation on public education" and "the extent of psychological knowledge"? These provided the rationale of the *Brown* decision, but Mr. Justice Frankfurter did not open his mouth in dissent.

Did the court have the power to do what it did? Mr. Justice Douglas, another of the nine, in other days had warned that long-run stability is best achieved when social and economic problems of the State and nation are kept under political management of the people. Writing in *49 Columbia Law Review* some years ago, he observed sagely that "it is when a judiciary with life tenure seeks to write its social and economic creed into the Charter that instability is created." In May 1954, Mr. Justice Douglas did his bit to create just that instability.

Did the court have the power? That was the essence of Question 3. It was the court's most profound inquiry, for it probed the very soul of judicial limitation and responsibility. Serious consideration of Question 3 would have required of the judges a respect for the wisdom and integrity of scores of judges and hundreds of State and Federal legislators, all equally sworn to uphold the Constitution, who had preceded them. The question should have suggested the utmost restraint, the most selfless exercise of judicial discipline. "Is it within the judicial power, in construing the amendment, to abolish segregation in public schools?"

"What is truth?" said jesting Pilate; and would not stay for an answer.

VI

The *School Segregation Cases* came up for reargument before the Supreme Court on December 8, 1953. By this time, the Kansas case was moot (it is one of the many ironies of the story that the school cases should be styled as *Brown* v. *Board of Education of Topeka*, taking their name from a controversy that had been settled by the time the opinion came down), but the cases from Virginia, South Carolina, and Delaware were still hotly at issue. The cast of lawyers was the same, and again, questions from the bench seemed to indicate a continuing division within the court.

Counsel for the Negro plaintiffs, grappling with Question 1, attempted to show that the Fourteenth Amendment was intended by its framers and adopters to have a "broad, general scope." John W. Davis and T. Justin Moore, carrying the brunt of argument for the South, relied upon the more tangible history of what actually happened in terms of racially separate schools. Davis placed particular emphasis upon the action of the Southern States in creating separate school systems, without objection from Congress, even as they ratified the amendment. Sumner and his fellow radicals might not have wanted to challenge such Northern allies as Pennsylvania and Ohio, but "if there were any place where sponsors of the amendment would have blown the bugle for mixed schools, surely it would have been in those eight States of Reconstruction legislation."

Frankfurter kept asking the various attorneys to explain why the Congress itself never had adopted legislation to prohibit the States from maintaining racially separate schools. Defense counsel said the Congress had no power to do so; attorneys for the Negro plaintiffs said Congress had the power, but opponents of segregation never had had the votes. Frankfurter put an embarrassing question to J. Lee Rankin, who as Assistant Attorney General had joined forces with the NAACP. "Realistically," Frankfurter suggested, "the

reason this case is here is that action couldn't be attained from Congress. Certainly it would be much stronger from your point of view if Congress had acted, wouldn't it?"

Rankin agreed, but insisted that the court could achieve the desired end by judicial pronouncement as well as the Congress could achieve it by legislative action. Frankfurter persisted, taking judicial notice of eighty-five years of segregation in Washington:

"Is it to be said fairly that not only did Congress not exercise the power under Section 5 with reference to the States but, in a realm in which it has exclusive authority, it enacted legislation to the contrary? Are you saying that legislation does not mean anything but what it does? It just segregates, that's all."

"Well, not exactly," Rankin replied. "You have to find a conscious determination by Congress that segregation was permitted under the Fourteenth Amendment."

"You think legislation by Congress is like the British Empire—something that is acquired in a fit of absent-mindedness?"

"I wouldn't make that charge before this court," said Rankin stiffly, "and I don't want to be quoted in that manner."

Nevertheless, Frankfurter's questions exposed the weakness of the plaintiffs' historical justifications. Rankin's astonishing idea—that Congress never really had thought much about what it was doing, during all the years since 1868 in which it had provided annually for segregated schools in Washington—was echoed in feeble attempts to explain away the judicial precedents. Jackson and Reed asked Rankin how he could account for decisions of Northern courts, in such cases as *Garnes, King,* and *Cory,* holding that the Fourteenth Amendment did not reach public schools. Rankin replied weakly that "apparently there was no detailed study of the history and background of the Fourteenth Amendment." This was too much for Jackson: "These men lived with the thing," he said; "they didn't have to go to books."

The question that most troubled Jackson, however, was the key question of judicial power. He wondered aloud if it were appropriate "for the court, after all that has intervened,

to exercise this power instead of leaving it to Congress." Thurgood Marshall, for the plaintiffs, insisted that theories of a dynamic, growing Constitution abundantly justified the court in reversing *Plessy* and in placing its own contemporary construction on the Amendment. John W. Davis, for the defense, strongly disagreed: "At some time to every principle comes a moment of repose, when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance."

Painstakingly, counsel for the Southern States called the roll of precedents supporting—or not disturbing—the long-established doctrine of "separate but equal." The *Plessy* case of 1896 had been followed in December 1899 by *Cumming* v. *Richmond County Board of Education* (175 U. S. 528). Here the facts were that a Georgia county had closed its Negro high school and required local Negro high school students to go into Augusta for schooling, in order to convert the high school to the needs of three-hundred elementary pupils. The Negro high school pupils sought an injunction to upset this arrangement. And though the denial of equal facilities locally might seem plain, a *unanimous* Supreme Court found no merit in the Negroes' claim. Some of the students might be inconvenienced by the requirement that they attend one of the three Negro high schools in nearby Augusta, but their inconvenience had to be set against the needs of the elementary children. Further, nothing constructive would be gained by closing the white high school merely because the Negro high school was no longer operating. "Under the circumstances disclosed," said the court, "we cannot say that this action . . . was, *within the meaning of the Fourteenth Amendment,* a denial by the State to the plaintiffs and those associated with them of the equal protection of the law, or of any privileges belonging to them as citizens of the United States. The education of the people in schools maintained by State taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land." [Emphasis supplied.] It is

curious, one may note in passing, that persons who so reverently admire Mr. Justice Harlan's dissent of 1896 in *Plessy* customarily fail altogether to acknowledge that it was Mr. Justice Harlan who spoke in 1899 for a unanimous court in *Cumming*.

The court's pronouncement in *Cumming* was cited the following year in the New York Court of Appeals (161 N. Y. 598), when Negro petitioners challenged the right and power of Queens Borough to maintain separate schools. The New York court refused to disturb the system: "It is equal school facilities and accommodations that are required to be furnished, and not equal social opportunities."

In November 1908, the Supreme Court considered a suit brought by Berea College against the Commonwealth of Kentucky (211 U. S. 45). Berea, a private college, had been operating as a racially integrated institution. A State law was enacted making it unlawful for any corporation chartered in Kentucky to maintain a private school on such a basis. On the grounds that the law was within Kentucky's power to regulate Kentucky corporations, a majority of the Supreme Court held the law valid. Harlan dissented warmly. He thought Berea's right to admit pupils of its own choosing to its classrooms was "a liberty inherent in the freedom secured by fundamental law," but he did not wish to be misunderstood: "Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense."

Six years later, the generic question of "separate but equal" was again before the Supreme Court, in *McCabe* v. *Atchison, Topeka & Santa Fe Railway Company* (235 U. S. 151). A Negro passenger had sued to halt enforcement of an Oklahoma law requiring racial separation on coaches. The trial court had dismissed the suit by calling attention to *Plessy* and saying that the power of the States to require separate but equal accommodations "could no longer be considered an open question." Said Hughes for a unanimous Supreme Court: "There is no reason to doubt the correctness of that conclusion."

Thirteen years elapsed. Membership on the court changed. On November 21, 1927, when the court decided *Gong Lum*

v. *Rice* (275 U. S. 78), Taft was Chief Justice; his brothers included such giants of the law as Holmes, Brandeis, and Stone. The question of the power of the States to maintain racially separate but equal schools was put squarely before the court. Mississippi had insisted that a Chinese child, Martha Lum, attend a Negro high school in Bolivar County instead of a white high school. This was what Taft said, speaking for a *unanimous* court:

> The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the State legislature to settle without intervention of the Federal courts under the Federal Constitution. . . . The decision is within the discretion of the State in regulating its public schools, *and does not conflict with the Fourteenth Amendment.* [Emphasis supplied.]

The *Gong Lum* case was in 1927. Eleven years later the Supreme Court dealt with a suit brought by Lloyd Gaines, a Negro, seeking admission to the law school of the University of Missouri (305 U. S. 337). The *Gaines* case is important, because it sometimes is said that it heralded in 1938 the end of "separate but equal" in 1954. It did no such thing. The State of Missouri then had no law school for Negroes; the practice was to pay tuition fees, out of State, for the few Negro students seeking legal education. Other Negro college students attended Lincoln University in St. Louis, where Missouri sought to fulfill its obligation to provide the same general advantages of higher education for Negroes that it provided for whites by furnishing equal facilities in separate schools. Chief Justice Hughes said for the court that this was a method, *"the validity of which has been sustained by our decisions."* He was sympathetic to Missouri's plan to build Lincoln University into an institution genuinely

equal to the University of Missouri at Columbia. "But commendable as is that action, the fact remains that instruction in law for Negroes is not now afforded by the State, either at Lincoln University or elsewhere." The court therefore ordered Gaines admitted to the Missouri Law School. McReynolds dissented, with Butler joining him. They felt Missouri's offer to pay Gaines' tuition in a nearby law school of good standing would provide the student with abundant opportunity to study law "if perchance that is the thing really desired." In attempting in good faith to meet the constitutionally sanctioned requirements of separate but equal, said McReynolds, "the State should not be unduly hampered through theorization inadequately restrained by experience."

Three other cases that were reviewed in the oral argument before the Supreme Court in December 1953 also dealt with higher education at the graduate-school level. The circumstances in *Sipuel* v. *Board of Regents of the University of Oklahoma* (332 U. S. 630) paralleled the circumstances of the *Gaines* case; the court entered no more than a *per curiam* order directing that *Gaines* be followed. On June 5, 1950, the last two cases were decided: *Sweatt* v. *Painter* (339 U. S. 629) and *McLaurin* v. *Oklahoma State Regents for Higher Education* (339 U. S. 637). In both opinions, the court, speaking through Chief Justice Vinson, was careful to emphasize that it was following *Gaines* (that is, that it was following "separate but equal") and was not reexamining *Plessy* at all. In the *Sweatt* case, Texas had attempted to establish a Negro law school at Austin that would be the equal of its University of Texas Law School in Houston. Relying upon the "intangibles that make for greatness in a law school," the court held such equality impossible of attainment. Similarly, in the *McLaurin* case, in which Oklahoma had sought to segregate a Negro graduate in the use of library and cafeteria facilities, Vinson held for the court that *"under these circumstances,"* the Fourteenth Amendment precluded any distinction in treatment of students based upon race.

Regardless of one's views on the rightness or wrongness of segregation in the public schools, how are these precedents fairly to be characterized? Plainly, they form one unbroken

chain, reaching back to the very ratification of the Fourteenth Amendment: *Garnes* in Ohio, *Stoutmeyer* in Nevada, *Ward* in California, *Cory* in Indiana, *Bertonneau* in Louisiana, *King* in New York, *Lehew* in Missouri, *Plessy* in Louisiana, *Cumming* in Georgia, *Berea* in Kentucky, *McCabe* in Oklahoma, *Gong Lum* in Mississippi, *Gaines* in Missouri—in every one of these, extending from 1871 to 1938, the doctrine of "separate but equal" had been judicially sanctioned as not in violation of the Fourteenth Amendment. And in *Sipuel, McLaurin,* and *Sweatt* the doctrine had simply been ruled not applicable in the peculiar circumstances of graduate-school instruction.

This was the chain the court snapped in the *School Segregation Cases.* Six months after the case had been reargued, on May 17, 1954, Chief Justice Warren spoke for a unanimous court in overruling and discarding this uniform interpretation of more than eighty years. The text of the court's opinion appears in the Appendix, along with its companion decision in the *Bolling* case from the District of Columbia. Here it will be seen that the court blandly dismissed the massive evidence of "intent" with a regal hand: The evidence was "inconclusive." Then, disdaining every rule of jurisprudence which says that law cases should be decided on points of law, the court delivered itself of some homilies on the importance of education: "Today, education is perhaps the most important function of State and local governments." Everyone must have an education: "It is the very foundation of good citizenship. It is a principal instrument in awakening the child to cultural values." Said the court:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

That was the key paragraph. The court went on to assert that the "intangible considerations" it had found to be important in graduate-school instruction apply with added force

to children in grade and high schools. "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Whatever may have been the extent of psychological knowledge at the time of *Plessy*, said the court, "this finding is amply supported by modern authority." And the court inserted its famous Footnote 11 to prove it.

This footnote directed the inquisitive reader to seven sources. The first was a paper prepared by Kenneth B. Clark, "The Effect of Prejudice and Discrimination on Personality Development," delivered at the 1950 White House Conference on Children and Youth; Clark, a professor of psychology at the College of the City of New York, was then at least presumptively on the payroll of the NAACP—he was "social science consultant for the NAACP's legal and educational division." A second source was "Personality in the Making," by Helen Leland Witmer and Ruth Kotinsky. The third was a report of a survey conducted for the American Jewish Congress in 1947 by Max Deutscher and Isidor Chein. They sent a questionnaire to 849 social scientists, asking, first in the affirmative and then in the negative, "[Do you] believe that enforced segregation has (has not) a detrimental psychological effect on members of the racial or religious groups which are segregated?" A second question, similarly phrased, sought the social scientists' opinions on whether such segregation has detrimental effects on the majority group imposing the segregation. All told, 517 of those queried returned the questionnaire (32 of the 517 were from the South). Not surprisingly, 90 per cent of the 517 obligingly answered Ja to the first question and 83 per cent said Ja to the second. Had there been an opportunity to put Deutscher and Chein on a witness stand, counsel for the South might have sought clarification on what was meant by "enforced," what by "segregation," and what by "detrimental," and rebuttal witnesses might have been summoned to testify on the effects, detrimental or otherwise, of enforced integration on the majority group.

The fourth authority cited by the court was a paper by

Chein in a publication of such large obscurity and small circulation that few persons can have examined it: "What are the Psychological Effects of Segregation under Conditions of Equal Facilities," in Volume 3 of the *International Journal of Opinion and Attitude Research* (1949). Fifth on the list was "Educational Costs in Discrimination and National Welfare," by Theodore Brameld, then a professor of educational philosophy at the University of Minnesota. The sixth reference was to Edward Franklin Frazier's *The Negro in the United States.* Frazier is a Negro sociologist, professor of sociology at Howard University, who served as chairman of UNESCO's committee of experts on race.

And finally, said the court, "see generally Myrdal, *An American Dilemma.*"

"We conclude," said the court, "that in the field of public education the doctrine of 'separate but equal' has no place. *Separate educational facilities are inherently unequal.*" [Emphasis supplied.] That final sentence contained perhaps the greatest irony of them all, for unless words have lost their meaning, the court here decreed equality for the Negro by finding the Negro innately not equal. What else did the court mean? Here we are told, on the authority of the most eminent court in the world, that if one-hundred Negro pupils are put to study in one building, and one-hundred white pupils are put to study in an identical building, the first group of pupils, who have been segregated solely on the basis of race, will make up a school *inherently* unequal to the other. "Inherently" comes from the Latin *haerere,* to stick; it means "firmly infixed; belonging by nature." And when the court concluded that separate schools for Negroes are inherently unequal, it made a judicial finding of fact with which a great many Southerners would find themselves in wry agreement.

That was the substance of the *Brown* decision. Because of the predictable impact of the ruling and the great variety of local conditions, the court asked for reargument on the formulation of specific decrees. A year later, on May 31, 1955, a supplementary opinion (this also appears in full in the Appendix) sent the cases back to the trial courts with instructions to enter decrees ordering "the parties to these cases admitted to public schools on a racially nondiscrimina-

tory basis with all deliberate speed." By that time, Kansas had abandoned segregation altogether in its schools; so had the District of Columbia; so had Delaware over much of the State. In the course of time, Prince Edward County, Virginia, was to abandon public education rather than submit to compulsory desegregation of its schools. The public schools of Clarendon County, S. C., are still operating as I write, in the spring of 1962, as completely segregated as they were in the spring of 1954. The new Negro schools are bright and shining and consolidated, and some of the children of the original plaintiffs of 1951, it is said, are placidly attending them.

What was wrong with the *Brown* decision? The Sibley Commission in Georgia summarized the South's protest in two sweeping sentences:

> We consider this decision utterly unsound on the facts; contrary to the clear intent of the Fourteenth Amendment; a usurpation of legislative function through judicial process; and an invasion of the reserved rights of States. We further consider that, *putting aside the question of segregation,* this decision presents a clear and present danger to our system of constitutional government, because it places what the court calls "modern authority" in sociology and psychology above the ancient authority of the law, and because it places the transitory views of the Supreme Court above the legislative power of Congress, the settled construction of the Constitution, and the reserved sovereignty of the several States. [Emphasis supplied.]

If the student of American government can do as the Sibley commission suggests, and put aside the question of segregation—eliminate all the emotional overtones of "prejudice" and "discrimination" and "second-class citizens"—he will get a clearer picture of the most disturbing aspect of the *School Segregation Cases.* One of the most cherished myths of American tradition, as strong and as insubstantial as any doctrine of religion, is that ours is "a government of laws, not men." Viewed coldly and nakedly, the proposition is palpably absurd; wine is wine, and bread is bread. But by some devout act of political transubstantiation, the faith of the

American people has imbued this doctrine with a special venerability: We have been reared to believe that law exists metaphysically, above and beyond the mortal men who enforce it. As an institution, the high court commands respect, not for the nine frail vessels beneath the robes, but out of deference to the higher, holier grail they represent.

And this was what the court shattered in the *Brown* case: The myth, the grail, the mystery of the law. "The judicial function is that of interpretation," Sutherland once said; "it does not include the power of amendment under the guise of interpretation." Cardozo said the same thing: "We are not at liberty to revise while professing to construe." Hughes said it too: "The power of this court is not to amend, but only to expound the Constitution as an agency of the sovereign people who made it and who alone have authority to alter or unmake it."

But the court disdained these ancient and elementary rules. "By its decision in the *Brown* case," former Justice Byrnes has said, "the court did not interpret the Constitution. It really amended the Constitution." This the court had no legal or moral right to do. It had only the power to do it— the absolute power, in Acton's famous phrase, that left unrestrained, corrupts absolutely.

Part III

Prayer of the Petitioner

I had not intended to write a "Part III" for this book. The object was to put forth a brief for the South in the single narrow field of racially separate public schools: my thought was to summarize and argue the law and the evidence of *Brown* v. *Board of Education* as the South views them, and to leave such issues as "sit-ins," and voting rights, and the Negro's future for another day. Yet a familiar part of the pleading in almost any case is the prayer of the petitioner, and there is something more to be said for the South in that hypothetical role.

Patience, the South would ask of its adversaries: Be patient; be tolerant of imperfection; be mindful that in these difficult areas of race and race relations, wisdom and virtue do not reside exclusively in the North, nor sin and ignorance exclusively in the South. The white man most surely has been at fault; that is conceded. But in his own way, the black man has been at fault too. And in neither racial camp can these faults be corrected in the twinkling of a generation.

The apostles of instant innovation, crying zealously for change, do not comprehend the elemental nature of the forces they are dealing with. "All is race," said Disraeli in *Tancred*; "there is no other truth." The earliest history of man reflects an awareness of racial distinctions; in one fashion or another, discrimination has existed through all recorded time, and "prejudice," if you please, like the poor, has been with us always. It exists among the Negro people themselves. It exists around the world, and may be seen in especially cruel and virulent forms in some of those nations said to be so terribly offended by the manifestations of segregation that remain in the American South. The beam in the eye of Herman Talmadge is small against the mote in the eye of Mr. Nehru. The Old World has lived with these problems several millennia longer than the New, but it has solved them not better; in truth, it has solved them much less well, and in most cases, it has not solved them at all.

As a creature of the law, racial segregation in the United States is dead. The voices once confidently raised in the

South, crying that the court would reverse itself in time, have all but died out now. The court will not reverse itself. On February 26, 1962, a *per curiam* opinion rebuked a Mississippi Federal court in icy terms: "We have settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities. The question is no longer open; it is foreclosed as a litigable issue." (*Bailey* v. *Patterson*, 30 LW 4164.) Similarly, the court has plunged far beyond the reasoning it advanced in *Brown* as a justification for prohibiting segregation in the schools; the hearts and minds of children, the importance of education, and the intangibles of a classroom do not figure at all in cases that involve golf courses, courthouse cafeterias, and the rest rooms of public buildings. Many staunch Southerners, declaring themselves unwilling to surrender, do not realize that as a matter of law, the war is over. There is now not the slightest possibility of a constitutional amendment to undo what the court did; the Congress will never pass a law that sanctions segregation in a public institution; the court is unanimous in its resolution, and some of its members are young. The Southern State that puts reliance hereafter in any law requiring racial separation is relying upon a vain and useless thing. We should be better off, as a matter of law, if Southern legislatures would go through their Codes with an art gum, erasing the word "Negro" wherever it appears. Statutory defenses against segregation, apart from any remaining value they may have in obtaining the law's delays, are useless.

These are harsh truths for the South, but the South would do well to grasp them; once understood, they suggest a course of events in which accommodation may be found within the broad structure of a voluntary society. Ovid is sufficient authority for the maxim that nothing is stronger than custom; and by relying upon custom, and freedom, and precepts of the law as yet uncorrupted by the court, the South—and here I mean the white South and the Negro South alike—can discover some room to turn around in.

Virginia has pointed a way toward such an accommodation, so far as education is concerned, in its freedom-of-choice program. Under an act of the General Assembly of

1958, every child in Virginia has a *right* to choose between attending a public school or a nonprofit, nonsectarian private school. The law has nothing to do with segregation or desegregation. The modest tuition grants provided in the law (in no case is a grant higher than the local per-pupil cost in public schools) are intended to represent each child's equal share in a total appropriation for purposes of education, and the State stands indifferent to the child's way of spending it: Public or private, it is all the same to the Commonwealth, so long as the child is schooled.

The freedom-of-choice plan is working now, harmoniously and effectively, in such areas of Virginia as Norfolk, Charlottesville, and Front Royal. In each of the localities, the public schools are desegregated; in each of the localities, good private schools are operating. Some white families have made one choice, some another. In a number of cases, white children living in Albemarle County and Norfolk County have obtained county tuition grants in order to attend the desegregated public schools of neighboring Charlottesville and Norfolk city. The State raises no objection. This is the students' right.

The private schools now operating in Virginia have limited their admissions, to the best of my knowledge, to white pupils only. This condition may change in time; nothing prevents the organization of nonprofit schools for Negroes only, or for Negroes and whites together. In any event, the right of any group of parents to found a school to their taste would appear beyond successful challenge. "The most natural right of man," said Tocqueville, "next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to be almost as inalienable in nature as the right of personal liberty. No legislature can attack it without impairing the foundations of society."

Virginia is feeling its way carefully with the freedom-of-choice program. In the 1960–61 school year, 8127 pupils (or a little less than 1 per cent of the 874,000 children in public schools) gave up their right to attend a public school and chose, instead, to exercise their rights under the 1958

law. They obtained grants amounting to $1.8 million out of total school spending (including sums for capital outlays) of some $290 million. Public school administrators, many of whom are fearful of private school competition and jealously opposed to the program, tend to regard the grants as a net cost—as something taken away from them. Plainly this is not true. About $200,000 in grants were taken by pupils who applied the sums to tuition costs in neighboring public schools, as in Charlottesville and Norfolk; other outlays were offset by the simple absence of the pupils from public schools—the State did not have to build classrooms or hire teachers to teach them. When it is kept in mind that the nonprofit private schools must meet their own capital costs from contributions and endowments, the prospect of an ultimate saving to the Commonwealth becomes evident. These construction costs are a part of the price a free people should be permitted to pay for freedom to conduct their lives as they wish. It is inconceivable that Federal courts should outlaw this voluntary, nondiscriminatory plan as a mere subterfuge or circumvention of the *Brown* decision. It emphatically is not.

In *Pierce* v. *Society of Sisters* (268 U. S. 510) the Supreme Court laid down the principles on which Virginia is relying. The opinion held unconstitutional an Oregon act of 1922 requiring children of that State to attend public schools and public schools only. A private military academy and a Catholic parochial school complained that the law violated the right of parents to choose schools for their children where the pupils would receive the sort of training the parents wished them to have; beyond that, the law violated the right of private schools and teachers to engage in a useful and lawful business or profession.

A unanimous court, speaking through Mr. Justice McReynolds, accepted the plaintiffs' position entirely. Oregon's law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." Their rights in this regard are guaranteed by the Constitution and may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. "The fundamental theory

of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

As Douglas said in *Lerner* v. *Casey* (357 U. S. 468), the liberties guaranteed to the citizen by the First and Fourteenth amendments include "the right to believe what one chooses, the right to differ from his neighbor, the right to pick and choose the political philosophy that he likes best, the right to associate with whomever he chooses, the right to join the groups he prefers, the privilege of selecting his own path to salvation." And in a case upholding the right of Negroes to associate, Mr. Justice Harlan expressed for the court the same view that white parents take in forming a private school for their children: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Fourteenth Amendment." (*NAACP* v. *Alabama,* 357 U. S. 449.)

The high court's opinion in the *School Segregation Cases* did nothing to interfere with these basic concepts of individual freedom of action in areas of education. It is important to understand, the Fourth U. S. Circuit Court of Appeals has said, "exactly what the Supreme Court has decided [in *Brown*] and what it has not decided in this case":

> It has not decided that the Federal courts are to take over or regulate the public schools of the States. It has not decided that the States must mix persons of different races in the schools or must require them to attend schools, or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a State may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the State may not do directly or indirectly; but if the schools which it maintains are open to children of all

races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people the freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the State or State agencies, not a limitation upon the freedom of individuals.

This interpretation by an exceptionally able appellate court offers the South, if only the South will accept it (and if our more rabid and influential friends in the North will abate their impatient demands), some basis for a tolerable way of life. In its immediate application, the Supreme Court's decision in the four suits decided by *Brown* was not, of course, "the supreme law of the land." It was, as every court opinion must be, simply the law of the case, disposing of the controversies between the named plaintiffs and the named defendants. Even though such suits are "class actions," the class in each case is limited by such facts as those of geography; a court order directed against Clarendon County does not require the superintendent of schools in adjoining Sumter County to do anything. Thus, under well-accepted principles of law, the counties and cities of the South that are not under court order stand under no legal obligation to alter their traditional school policies. No law or court order requires them to integrate; no law or court order requires them affirmatively to take any action. True, if a point is made of it, and formal complaint of discrimination is filed, local school officials must then yield to the principles laid down by the Supreme Court; they can yield voluntarily, or they can go through the motions of a predictable court proceeding, but they cannot deny the child by reason of his race the right to attend any public school under their supervision.

This deliberate, unhurried view of the school problem tends to madden the professional integrationist. He looks at

the progress of desegregation in the South, eight years after *Brown*, and apart from the border States he sees:

DESEGREGATION OF PUBLIC SCHOOLS,
ELEVEN SOUTHERN STATES, MAY 17, 1962

State	*Enrollment*		*Negroes in Schools With Whites*	
	White	*Negro*	*Number*	*Per cent*
Alabama	523,000	276,000	0	0.000
Arkansas	320,000	109,000	151	0.139
Florida	927,000	242,000	648	0.268
Georgia	642,000	303,000	8	0.003
Louisiana	450,000	295,000	12	0.004
Mississippi	294,000	287,000	0	0.000
North Carolina	787,000	333,000	203	0.061
South Carolina	364,000	265,000	0	0.000
Tennessee	663,000	155,000	1,167	0.750
Texas	1,892,000	301,000	4,000	1.330
Virginia	657,000	217,000	536	0.247

Source: Southern School News, May 1962.

These figures arouse the South's critics, but another fact contributes more significantly to their exasperation: The people of the South, white and Negro together, continue to dwell amiably side by side. Except where hired missionaries from the NAACP can stir up a lawsuit, agitation for an end to school segregation ranges from small to nil. The Southern States have put these past eight years to good use in pouring a fortune into equalization of Negro school facilities. Old patterns persist because many Negro families, to the disgust of the U. S. Civil Rights Commission, find the patterns not intolerable. In Virginia, for example, Negro parents know that they can petition successfully for admission of their children to the nearest "white" school; local officials no longer even resort to court delays. But three years after collapse of Virginia's massive resistance, fewer than one-quarter of 1 per cent of the Negro parents have taken the trouble to do so.

This slow path toward evolutionary change should commend itself to reasonably minded men. Whatever violence to constitutional law was done by the *Brown* decision, it is done; we ought not to condone it, defend it, rationalize it, or forgive it, but we ought not to pretend that it never happened. We of the South have to live with these new legal principles, and accommodate our society to them. So far as the education of children is concerned, this can be done (1) by continuing to provide the best possible schools our resources can provide; (2) by continuing to separate children by race, in the certain conviction that such basic pupil assignments violate no law or court order, and are in accord with community wishes; and (3) by approving and accepting individual, particular applications for transfer or admission on a genuinely nondiscriminatory basis. And if, in addition, entirely apart from any racial considerations whatever, a freedom-of-choice program can be put in motion to stimulate the growth of private education, the South's school problems can be controlled for a long time to come.

Your petitioners are hopeful that such an approach, much as it may annoy the advocates of compulsory integration, will find a favorable response among men who are willing to take the long view. It seems to us wholly in accord with the oldest principles of federalism—principles that have contributed much to the strength and vitality of this Republic. It is the diversity of the States, their ability to experiment, their right and power to respond to a variety of local conditions and customs that together prevent the evils of excessive centralism. "The traditions and habits of centuries were not intended to be overthrown when the Fourteenth Amendment was passed," said Holmes. He remarked again: "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

Not only is this approach in accord with a wise federalism;

it also offers the greatest opportunity to the Southern Negro himself. In the course of a debate in the *Saturday Review* with William Sloane Coffin, the New York-born William F. Buckley, Jr., said this: "If it is true that the separation of the races on account of color is nonrational, then circumstance will in due course break down segregation. When it becomes self-evident that biological, intellectual, cultural, and psychic similarities among the races render social separation atavistic, then the myths will begin to fade, as they have done in respect of the Irish, the Italian, the Jew; then integration will come—the right kind of integration."

The South has begun to look upon its Negro people, since *Brown,* in a new way. Shortcomings of the Negro that earlier had been merely sensed are now acutely seen. But this is no bad thing. Before any social ill may be remedied, it first must be diagnosed and understood. Many a Southerner is now sensitive to the outward and visible signs of segregation; he was not so before. Today the detritus of a crumbling institution may be observed at every hand, and there are times when he squirms a little inside. This retreat to neutrality on the white man's part is a necessary condition if the Negro, *by his own exertions,* is to find an equal place in the sun. In the end, the white man cannot do the job for him; Jim Crow is dead, but the legal shot that felled him also put Massa in the cold, cold ground. It is said that the high court "cast off the Negro's shackles"; it cast off his crutches too. The paternalism of generations is vanishing year by year, to be replaced by a healthy skepticism: The Negro says he's the white man's equal; *show me.*

No decree of court, no act of Congress, can give the Negro more than this. He has no right—no legal right, no moral right—to intrude upon the private institutions of his neighbors. If individual liberty means anything, it must mean that each individual, regardless of color, is at liberty to choose his own personal and business associates, and to choose them for whatever reason. This the Negro must understand. If he is to become a part of this association, on equal terms, he must do what every other race of men has done since time began, and that is to demonstrate his

worth to the community he seeks to enter. For more than three-hundred years, the white South by and large has regarded such entry as impossible. I would be less than honest if I did not acknowledge that a great part of the Deep South still views the slightest yielding as anathema. But elsewhere in my changing and unchanging land, the old unequivocal "no" to Negro equality slowly merges into a doubtful "maybe." On the day that I write these concluding paragraphs, the local transit company in Richmond has announced employment of its first Negro bus drivers. The story made page one; but it made just the bottom of page one, and the Capital of the late Confederacy will not voice the slightest ripple of objection. If these drivers make it up the hill, others will follow. If the first Negro clerks in local retail stores can sell themselves, the experience of one merchant will persuade his neighbor. And the more the Negro people can do within their own neighborhoods and business communities, the more the white community's retreat to neutrality will continue.

I believe the South will maintain what I have termed essential separation of the races for years to come. This means very nearly total segregation in education, where the intimate, personal, and prolonged association of white and Negro boys and girls, in public schools, in massive numbers, as social equals, is more than community attitudes will accept. The sad example of Prince Edward County, where a resolute rural people abandoned all public schools, offers an instructive lesson to the advocates of frontal assault. "We see the wisdom of Solon's remark," Jefferson once observed, "that no more good must be attempted than the nation can bear." This essential separation also takes in such wholly social institutions as private clubs. I cannot foresee the integration of Protestant churches in the South. And whatever the Supreme Court may do in time to the miscegenation laws, ostracism, swift and certain, awaits those who would cross this marital line. But my guess would be that in areas of higher education, in many fields of employment, in professional associations, in such quasi-public fields as hotels, restaurants, and concert halls, doors that have been closed will open one by one. And a South that once

would have regarded these innovations with horror will view them at first with surprise, then with regret, for a time with distaste, and at last with indifference. As the migration of the Negro out of the South continues, other parts of the nation, at once benefited and handicapped for want of the South's experience in coexistence, will grapple in their own fashion with the cultural and economic assimilation of the Negro. They will not find it easy, but they can rely upon this: The South will not intrude its views upon theirs. This is a big country, a great country· it remains the freest country on earth, and the Negro people are a part of it. The law has done what it can for Negroes as a whole; the law will do more, in specific situations. The rest is up to time, and up to the Negroes themselves.

Appendix

Appendix

BROWN et al. v. BOARD OF EDUCATION OF TOPEKA et al [347 U. S. 483]

Appeal from the United States District Court for the District of Kansas*

Argued December 9, 1952.—Reargued December 8, 1953.—Decided May 17, 1954.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1]

*Together with No. 2, *Briggs et al.* v. *Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9–10, 1952, reargued December 7–8, 1953; No. 4, *Davis et al.* v. *County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7–8, 1953; and No. 10, *Gebhart et al.* v. *Belton et al.*, on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

[1] In the Kansas case, *Brown* v. *Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan. Gen. Stat. § 72–1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially

In each of these cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amend-

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equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F. Supp. 797. The case is here on direct appeal under 28 U. S. C. § 1253.

In the South Carolina case, *Briggs* v. *Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S. C. Const., Art. XI, § 7; S. C. Code § 5377 (1942). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F. Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U. S. 350. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F. Supp. 920. The case is again here on direct appeal under 28 U. S. C. § 1253.

In the Virginia case, *Davis* v. *County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va. Const., § 140; Va. Code § 22–221 (1950). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant.

ment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy* v. *Ferguson,* 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was heard in the

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But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F. Supp. 337. The case is here on direct appeal under 28 U. S. C. § 1253.

In the Delaware case, *Gebhart* v. *Belton,* the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del. Const., Art. X, § 2; Del. Rev. Code § 2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. 87 A. 2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, *infra,*), but did not rest his decision on that ground. *Id.,* at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A. 2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U. S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

[2] 344 U. S. 1, 141, 891.

1952 Term, and reargument was heard this Term on certain questions propounded by the Court.[3]

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time.[4] In the South,

[3] 345 U. S. 972. The Attorney General of the United States participated both Terms as *amicus curiae*.

[4] For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II; Cubberley, Public Education in the United States (1934 ed.), *cc.* II–XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269–275; Cubberley, *supra*, at 288–339, 408–431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (*e. g.*, the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408–423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. *Id.*, at 427–428. The low status of Negro education in all sections

the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost non-existent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[5] The doctrine of "separate but equal"

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of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112–132, 175–195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563–565.

[5] *Slaughter-House Cases*, 16 Wall. 36, 67–72 (1873); *Strauder* v. *West Virginia*, 100 U. S. 303, 307–308 (1880):

"It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a neces-

did not make its appearance in this Court until 1896 in the case of *Plessy* v. *Ferguson, supra,* involving not education but transportation.[6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education.[7] In *Cumming* v. *County Board of Education,* 175 U. S. 528, and *Gong Lum* v. *Rice,* 275 U. S. 78, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Oklahoma,* 332 U. S. 631; *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt* v. *Painter, supra,* the Court expressly reserved decision on the question whether *Plessy*

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sary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

See also *Virginia* v. *Rives,* 100 U. S. 313, 318 (1880); *Ex parte Virginia,* 100 U. S. 339, 344–345 (1880).

[6] The doctrine apparently originated in *Roberts* v. *City of Boston,* 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[7] See also *Berea College* v. *Kentucky,* 211 U. S. 45 (1908).

[8] In the *Cumming* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the *Gong Lum* case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

v. *Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt* v. *Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child

[9] In the Kansas case, the court below found substantial equality as to all such factors. 98 F. Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F. Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F. Supp. 337, 341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A. 2d 137, 149.

may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt* v. *Painter, supra,* in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin* v. *Oklahoma State Regents, supra,* the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[10]

Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson*, this finding is amply supported by modern authority.[11] Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[12]

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question— the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full

[10] A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." 87 A. 2d 862, 865.

[11] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674–681. And see generally Myrdal, An American Dilemma (1944).

[12] See *Bolling* v. *Sharpe*, *post*, p. 497, concerning the Due Process Clause of the Fifth Amendment.

assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[13] The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

It is so ordered.

[13] "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment:

"(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[14] See Rule 42, Revised Rules of this Court (effective July 1, 1954).

BOLLING et al. v. SHARPE et al
[347 U. S. 497]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 10–11, 1952.—Reargued December 8–9, 1953.—Decided May 17, 1954.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case challenges the validity of segregation in the public schools of the District of Columbia. The petitioners, minors of the Negro race, allege that such segregation deprives them of due process of law under the Fifth Amendment. They were refused admission to a public school attended by white children solely because of their race. They sought the aid of the District Court for the District of Columbia in obtaining admission. That court dismissed their complaint. The Court granted a writ of certiorari before judgment in the Court of Appeals because of the importance of the constitutional question presented. 344 U. S. 873.

We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools.[1] The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[2]

[1] *Brown* v. *Board of Education, ante,* p. 483.
[2] *Detroit Bank* v. *United States,* 317 U. S. 329; *Currin* v. *Wallace,* 306 U. S. 1, 13–14; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 585.

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.[3] As long ago as 1896, this Court declared the principle "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race."[4] And in *Buchanan* v. *Warley*, 245 U. S. 60, the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law.

Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.[5] We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.

For the reasons set out in *Brown* v. *Board of Education*, this case will be restored to the docket for reargument on Questions 4 and 5 previously propounded by the Court. 345 U. S. 972.

It is so ordered.

[3] *Korematsu* v. *United States*, 323 U. S. 214, 216; *Hirabayashi* v. *United States*, 320 U. S. 81, 100.

[4] *Gibson* v. *Mississippi*, 162 U. S. 565, 591. Cf. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 198–199.

[5] Cf. *Hurd* v. *Hodge*, 334 U. S. 24.

BROWN et al. v. BOARD OF EDUCATION OF TOPEKA et al

[Supplementary opinion of May 31, 1955]
[349 U. S. 294]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date,[1] declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief.[2]

[1] 347 U. S. 483; 347 U. S. 497.

[2] Further argument was requested on the following questions, 347 U. S. 483, 495–496, n. 13, previously propounded by the Court:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

In view of the nationwide importance of the decision, we invited the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas filed briefs and participated in the oral argument.

These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as *amici curiae,* and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation. The defendants in the cases coming to us from South Carolina and Virginia are awaiting the decision of this Court concerning relief.

Full implementation of these constitutional principles may require solution of varied local school problems, School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.[8]

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its

[8] The cases coming to us from Kansas, South Carolina, and Virginia were originally heard by three-judge District Courts convened under 28 U. S. C. §§ 2281 and 2284. These cases will accordingly be remanded to those three-judge courts. See *Briggs* v. *Elliott,* 342 U. S. 350.

remedies[4] and by a facility for adjusting and reconciling public and private needs.[5] These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such

[4] See *Alexander* v. *Hillman*, 296 U. S. 222, 239.
[5] See *Hecht Co.* v. *Bowles*, 321, U. S. 321, 329–330.

orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case—ordering the immediate admission of the plaintiffs to schools previously attended only by white children—is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion.

It is so ordered.

A BIBLIOGRAPHICAL NOTE

THERE STANDS in the Grove of Academe, or so I have often imagined, a certain idolatrous image. It is a crane-like creature with italic wings, the great god *Ibid.*, and before it, strutting on their tiny six-point feet, the pedant peacocks daily make obeisance. They look up, *supra,* and down *infra,* and spreading their tails with asterisk eyes, they march with robed scholars to lay garlands of *op. cit.* upon the ritual shrine.

When I launched into this book, I swore a blasphemous oath upon such phony veneration. After a long life of reading footnotes, and reading them religiously, I have concluded that 98.2 per cent of them are so much flummery: They are showin' off befo' God. Thus I had not planned upon notes or bibliography, and this extended note is afterthought; it is the reluctant consequence of listening to beguiling editors. They said: Where did you get all this stuff? Whence these bizarre ideas? They said: Serious students will want to know where to get supporting material intended to prove (a) that you are a fraud, or (b) that there may be something to the Southern position after all. You ought to gird up your Gothic archness with a few flying buttresses of attribution. And in a moment of weakness, I said very well.

The figures on population, area, wages, housing, and the like, in the opening pages of this book, come primarily from the 1960 Census and the *Statistical Abstract of the United States for 1961.* The Census people have a diabolical genius for presenting their data in the least usable possible form, but they have a monopoly on the figures and no other source exists.

As for the nature of the South: Almost every Southerner who writes for a living at one time or another has wooed this elusive theme. I would suggest that a student start with W. J. Cash's *The Mind of the South,* not because I agree with everything Cash had to say, but because his brief star flashed with a rare brilliance across the Southern sky. The

Knopf edition of 1941 is now available in a Doubleday Anchor paperback, and though parts of it are dated, it continues to offer a good basic foundation. Then, at random, William Alexander Percy's *Lanterns on the Levee,* and David Cohn's *Where I Was Born and Raised.* The late William Polk of Greensboro, N.C., was a delightful gentleman; during an editorial writers' convention in Boston, we once talked of the South's problems between the bumps and grinds of an Old Howard Burly-Q. His book, *Southern Accent* (1953) is fine background reading. Although they are hard to find, Ward Allison Dorrance's several books on Southern rivers are worth the effort. Some good essays appear in *The Lasting South* (1957), a collection edited largely by Louis D. Rubin, Jr., though my own name is on the spine too.

A great many other books about the South come to mind. Henry Grady's *The New South,* published in 1890, is almost indispensable. Another necessary work, of seminal influence, is the Agrarians' *I'll Take My Stand* of 1930. I come back frequently to Matthew Page Andrews' *Virginia, The Old Dominion.* C. Vann Woodward's several books are useful: *The Burden of Southern History, Origins of the New South,* and *The Strange Career of Jim Crow.* The serious student's reading list would find a place for *Seeds of Time,* by Henry Savage, Jr.; *Southern Tradition and Regional Progress,* by William H. Nicholls; *The Southern Heritage,* by James McBride Dabbs, and *Goodbye to Uncle Tom,* by J. C. Furnas. Thomas D. Clark's *The Emerging South* is good on economic history. Virginius Dabney's *Below the Potomac,* published in 1942, remains a solid work. Bernard Robb's *Welcum Hinges* is at once gentle and delightful. The student should not pass by Harry Ashmore's *Epitaph for Dixie* (1958) and *The Other Side of Jordan* (1960). And of course, before it gets overlooked by reason of its bulk and importance, the multi-volumed history of the South emerging from Louisiana State University Press is a primary reference.

Many of the foregoing titles—alas, almost all of them—are the work of Southern Liberals. And I do not seem to have mentioned P. D. East's *The Magnolia Jungle,* or Hodding Carter's *Southern Legacy* and *Where the Main Street Meets the River,* and *The South Strikes Back,* or Robert

Penn Warren's *Segregation,* or Jonathan Daniels' *A Southerner Discovers the South* and *Frontier on the Potomac.* Nearly all the recent crop of books are cast in molds more liberal yet: Carl T. Rowan's *Go South to Sorrow;* John Howard Griffin's *Black Like Me,* and Richard Wright's *White Man, Listen!* Wilma Dykeman and James Stokely have co-authored two books worth serious thought: *Neither Black nor White,* and *Seeds of Southern Change.* A student's shelf should leave a place for William Peters' *The Southern Temper.* Several books of largely contemporary, topical interest should be read: Martin Luther King's account of the Montgomery boycott, *Stride Toward Freedom;* Bishop Robert R. Brown's *Bigger Than Little Rock;* Virgil T. Blossom's *It Has Happened Here;* and John Bartlow Martin's generally well-balanced *The Deep South Says Never.* Martin's book is the work of a professional reporter. Most of the rest of the books mentioned in this paragraph annoyed the hell out of me.

Against this monstrous amount of sack, one finds but a penny's worth of bread. The conservative South has not lacked willing spokesmen; it has lacked agreeable publishers. A bare handful of works present a contrary view, and some of these—Herman Talmadge's *You and Segregation,* and W. E. Debnam's impudent *Weep No More, My Lady,* and *My Old Kentucky Home, Good Night*—are in paperback. The scant list of hardcover works espousing the point of view of several million white Southerners includes only Bill Workman's *The Case for the South* (1960) Carleton Putnam's *Race and Reason, a Yankee View,* and my own *The Sovereign States* (1957), a book I still like very much. (There is also Charles P. Bloch's lawyerly *States Rights: The Law of the Land,* but that probably should be mentioned later in books on legal aspects of the question.)

One scarcely knows where to begin on books dealing with the Negro as such. The literature in this field is unending. In fairness, the student should seek out a couple of books that advance the traditional Southern view: Earnest Sevier Cox's *White America* (1923) and, from as far back as 1910, E. H. Randle's slim *Characteristics of the Southern Negro.* In the same year that Randle wrote his book, an English critic, William Archer, brought forth *Through Afro-*

America. These three works are period pieces now, but they still have value.

I have relied heavily in writing this book on Nathaniel Weyl's *The Negro in American Civilization.* Needless to say, a hundred other works are arrayed against his point of view. The student doubtless will have to begin with almost anything from W. E. B. DuBois, keeping in mind that DuBois, the grand old Red of the NAACP, formally joined the Communist Party in 1961. His works are important, nonetheless. Jerome Dowd's *The Negro in American Life* (1926) is long, and outdated, but still most useful. A thoughtful reader will find a few hours for Tuskegee's Robert R. Moton; his autobiography of 1920, *Finding a Way Out,* even then predicted a day when the white South would "stop feeling and begin thinking" about its Negro problem, and his *What the Negro Thinks* (1929) offers an insight into the continuing nature of Negro goals. A more militant work by the NAACP's James Weldon Johnson, *Negro Americans, What Now?* appeared in 1934. And thinking of the NAACP, Mary White Ovington's *The Walls Came Tumbling Down* (1947) contains some material not available elsewhere.

Of more recent vintage, half a dozen studies of the Negro deserve mention as reference works. Primus, of course, the monumental (and monumentally unreadable) work of Gunnar Myrdal and his associates, *An American Dilemma.* There are said to be eleven persons in the United States, apart from the collaborators, who have read the whole two volumes; I am not among them. But I ploughed through most of it. Arnold Rose, Myrdal's chief assistant, has brought out a condensation, published in 1948 as *The Negro in America.* Rayford W. Logan of Howard University, one of the most prolific writers in the field, has produced a number of works of substantial value, among them *The Negro in American Life and Thought* and *The Negro in the Postwar World.* His colleague, Edward Franklin Frazier, also has published extensively; his *The Negro in the United States* (1957) is quite useful. Still another Negro writer, Arna Werdell Bontemps, should be consulted through her *100 Years of Negro Freedom.* An interesting work that I came across after this man-

uscript was finished is Gilbert Franklin Edwards' *The Negro Professional Class* (1959).

In the narrower field of political action, the general reader should begin with V. O. Key's major work, *Southern Politics in State and Nation,* which sets the scene, and then go back to William Felbert Nowlin's work of 1931, *The Negro in American National Politics.* A good contemporary work is *The Negro and Southern Politics,* by Hugh Douglas White. Of less value, in part because of its arrogant tone, is Henry Lee Moon's polemical *Balance of Power: The Negro Vote* (a typical reference is to the "political zombies who infest the sub-Potomac region). Report of the Civil Rights Commission and the Southern Regional Council are indispensable.

For the absolute amateur, coming cold into the field of anthropology, E. E. Evans-Pritchard's BBC lectures, *Social Anthropology,* offer a most congenial introduction. This should be followed, I suggest, by Alfred Louis Kroeber's *Anthropology,* originally published in 1923 and updated in 1948. It is hard work. Then, in a hard-driving rush: Ralph Linton's *The Tree of Culture,* Carleton S. Coon's *The Story of Man,* Hooton's *Apes, Men and Morons* and *Up from the Ape,* Clyde Kluckhohn's *Mirror for Man;* almost anything by Toynbee and Breasted; and warming to the more immediate theme, Franz Boas' *Anthropology and Modern Life* (1928) and his *Race, Language and Culture* (1940). Boas was the great-granddaddy of the whole Liberal movement in social anthropology; he influenced a generation or more of dutiful followers. Melville Herskovits, of Northwestern, has written (1943) an agreeable biography of him. It merits a reading. And so do Herskovits' own works, *The American Negro* (1928) and his more definitive *The Myth of the Negro Past* (1958). Otto Klineberg's works are important: *Negro Intelligence and Selective Migration* (1935) and the useful anthology, *Characteristics of the American Negro* (1944). The famous UNESCO pamphlet on race has been covered in the text; Ruth Benedict and Gene Weltfish belong in a footnote. A very small footnote. Ashley Montagu, a monstrously irritating man, has to be read, or at least scratched: *Man: His First Million Years, Human Heredity,* and *Man in Process.* This last work I fetched home only a

week ago. I do not like Ashley Montagu. Langston Hughes' *African Treasury* is about what you would imagine Hughes would put out. Better, on African background, are John Coleman De Graft-Johnson's *African Glory: The Story of Vanished Negro Civilizations* (1955) and Maurice Delafosse's *The Negroes of Africa* (1931). But the bibliography in this area is extensive, and it grows more rapturous all the time. *The African Colonization Movement,* by P. J. Staudenraus (1961) is as good a roundup of this early nineteenth-century movement as I have come across.

In the text, I have called attention to Dr. Audrey M. Shuey's *Testing of Negro Intelligence.* Let me call repeated attention to it here. This is an indispensable reference work, of unimpeachable integrity, for any student who proposes seriously to investigate Negro scores on intelligence tests. The student also should seek out Dr. Henry E. Garrett's *Great Experiments in Psychology* (1951), and he should get his subscription in to *Mankind Quarterly,* 1 Darnaway St., Edinburgh 3, Scotland. At the University of Chicago, Dr. Dwight J. Ingle has demonstrated a fierce and wonderful courage in admitting unorthodox views to his *Perspectives in Biology and Medicine,* in which Dr. Montagu has been recently skewered.

This gets me, by hop, skip and jump, to reference works in the area of Constitutional history, law, and contemporary politics. The *Federalist,* of course. Elliot's *Debates.* Madison's *Notes.* Tocqueville. Jefferson's Letters. Madison. There is no stopping point. The biographies of Marshall and Washington. James Morton Smith's *Freedom's Fetters.* Bibliography is futile. The student of the Constitution will read a thousand works, and then read a thousand more. He shouldn't miss Charles Warren's *The Supreme Court in U.S. History.* Yale's Fred Rodell is a derisive fellow; his *Nine Men* is a fine, extended raspberry cheer, but it should be read. Most of the members of the Court have been loquacious; they cannot keep their tongues tied down. The law reviews fairly bulge with important material. Robert B. McKay's long essay in the *New York University Law Review* (June, 1956) is no help to my position, but it merits a reading. Basic source material, of course, is available through the indispensable

Race Relations Law Reporter. The student interested in getting both sides of this dispute should look up Senator Eastland's "Era of Judicial Tyranny," available through the Citizens Council, and Alfred J. Schweppe's article in the American Bar Association's *Journal* of February, 1958, "Enforcement of Federal Court Decrees." On the question of private schools, a biased and snippy book by Donald Ross and Warren E. Gauerke, *If the Schools Are Closed,* merits a reading. The two Emory professors are anti-private school, but the source material is there. I have already mentioned Charles J. Bloch's *States Rights: The Law of the Land;* it is a first-rate piece of work.

On the Fourteenth Amendment: Joseph B. James' work is basic, *The Framing of the Fourteenth Amendment* (1956). See also Walter J. Suthon's article in the *Tulane Law Review* of December, 1953, "The Dubious Origin of the Fourteenth Amendment"; Horace E. Flack's "The Adoption of the Fourteenth Amendment," in *John Hopkins Studies* (1908), and Joseph F. Ingham's "Unconstitutional Amendments," in the *Dickinson Law Review* of March, 1929, among many other sources.

It is futile to attempt any bibliographical note on the specific subject of school desegregation since 1954. The library of the Southern Educational Reporting Service in Nashville is a stonehouse of material to be found nowhere else. I am indebted to Reed Sarratt and his associates there for making its riches available to me. Don Shoemaker's *With All Deliberate Speed;* Harry Ashmore's *The Negro and the Schools;* and *Public Education in the South Today and Tomorrow,* by Ernst W. Swanson and John A. Griffin (1955), are basic references. Any serious study must take in the annual reports of the various Southern State superintendents of public education. Bill Simmons, the urbane and immensely attractive executive director of the Citizens Council in Jackson, Miss., has a wealth of material available; student debaters who get stuck with the Southern side of the question should not hesitate to write him at the Plaza Building in Jackson.

This is about all the bibliography I am up to. Any student who delves into this subject necessarily will resort

immediately to the Periodical Index. It teems with magazine references. Offhand, I know of not more than a dozen articles that present some aspects of the traditional Southern view—this, out of *more than two thousand* indexed articles supporting the integrationist view since 1954. Look them up: Clifford Dowdey, in *Saturday Review* of Oct. 9, 1954; Senator Ervin, in *Look* of April 3, 1956; Herbert Ravebel Sass, in *Atlantic* of November 1956; Tom Waring, in *Harper's,* January 1956; Virginius Dabney, in *Life* of Sept. 22, 1958; William F. Buckley, Jr., in *Saturday Review* of Nov. 11, 1961; Perry Morgan, in *Esquire* for January, 1962; Donald R. Davidson in the *Star Weekly Magazine* for Nov. 9, 1957. There may have been a few others. The Citizens Council has a wealth of pamphlets, booklets, and other ephemera available to the student who troubles to ask for reference material. And of course the microfilmed resources of the Southern Educational Reporting Service are invaluable.

I owe thanks to my right arm, Ann Lloyd Merriman; and to my publisher in Richmond, D. Tennant Bryan; and to the librarians of the State Law Library, the Library of Congress, and the state and city libraries in Richmond; to my congenial masters at Collier Books; to Dr. Henry E. Garrett; to John Riely, attorney, who made available to me the briefs of all parties in the School Segregation Cases; to various antagonists of the NAACP, among them Thurgood Marshall and Spotswood Robinson III. And the day this book appears, in glancing over this incomplete and sketchy note, I will think of a hundred other sources and mentors to whom I shall ever be

Gratefully theirs,
J.J.K.

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